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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

EUGENE SMALDONE, aka CHECKERS, aka MOSES; EUGENE LOUIS SMALDONE, aka YOUNG GENE, aka HUGH; MICHAEL J. VALLEY; LEO EDWARD LANE; JOSEF RICHARD ERNER, aka JOSEPH, aka RICK; and HARRY ANTHONY VILLANO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

No. 73-

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners herein pray that a Writ of Certiorari issue to review the Judgment of the Tenth Circuit Court of Appeals entered in the above-entitled case on October 12, 1973.

I. *OPINIONS BELOW*

The Opinion of the Court of Appeals for the Tenth Circuit has not been officially reported as of this date. A copy of the Opinion is appended to this Petition.

II. *JURISDICTIONAL GROUNDS*

The date of the Judgment sought to be reviewed is October 12, 1973. A Petition for Rehearing was filed in the United

States Court of Appeals for the Tenth Circuit on October 26, 1973 and denied by that Court on November 7, 1973. A Petition for a Stay of Mandate was filed in the Tenth Circuit on November 12, 1973. On November 26, 1973, the Court of Appeals for the Tenth Circuit entered an order staying the mandate as to all of the above Petitioners to and including December 26, 1973, pending the timely filing of a petition for writ of certiorari in this Court.

This Court is vested with the jurisdiction to review the judgment by a writ of certiorari by virtue of 28 U.S.C. §1254(1).

III. *QUESTIONS PRESENTED FOR REVIEW*

A. Does 18 U.S.C. §1955, by incorporating a state gambling law into the federal statute for the purpose of establishing illegality, unduly invite double jeopardy in violation of the Fifth Amendment to the United States Constitution?

B. In view of the evidence of widespread pre-trial publicity directed toward the Smaldone defendants, was it error for the Court to deny defendants' Motion for a Change of Venue?

C. Does the summary exclusion from the jury panel of all prospective jurors who admitted having even heard the name Smaldone violate the prospective jurors' First Amendment Right and the defendants' Sixth Amendment rights to an impartial jury?

D. Did the trial court, in instructing the jury that when a "person conducted a part of the gambling business, he *ran the risk* that it might involve five or more persons . . . ," commit error with respect to its duty to instruct the jury on the requisite elements of Specific Intent.

IV. *STATEMENT OF THE CASE*

This was a criminal prosecution brought by the United States of America on a Grand Jury Indictment filed in the United States District Court for the District of Colorado on July 14, 1972. The amended indictment charged in two counts that twelve

persons joined together at various times from October 16, 1970, through January 31, 1972, to violate 18 U.S.C. §§ 1955 and 2. The matter came on for jury trial before the Honorable Alfred A. Arraj, Chief Judge of the United States District Court for the District of Colorado. On September 28, 1972, the jury returned verdicts of guilty as to all defendants except Harvey Arthur Williams who was acquitted. Following the imposition of sentence an appeal was taken to the United States Court of Appeals for the Tenth Circuit. The Judgment was affirmed in the consolidated appeal as to all defendants.

In the event that other issues raised by counsel for the remaining co-defendants are presented to this Court in a Petition for Writ of Certiorari, all portions of any such petition(s) are incorporated herein by reference pursuant to Rule 21(4) of the Rules of the Supreme Court of the United States.

V. *REASONS AND GROUNDS SUPPORTING THE ALLOWANCE OF THE WRIT*

On the basis of the important constitutional issues raised by the following arguments of Petitioners, it is respectfully submitted that the necessary resolution of such important federal questions requires the granting of the instant Petition for Writ of Certiorari.

A. *18 U.S.C. §1955, by incorporating a state gambling law into the federal statute for the purpose of establishing illegality, unduly invites double jeopardy in violation of the Fifth Amendment to the United States Constitution.*

It is the Petitioners' position that 18 U.S.C. § 1955 represents an unconstitutional invitation to double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Although it has been held that under the system of "dual sovereignties," a state could constitutionally prosecute a defendant for the same crime under which he had previously been prosecuted by the Federal Government, and vice-a-versa, *Bartkus vs. People of State of Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *Abbate v. United States*, 359 U.S.

187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959), it is herein submitted that since Section 1955 establishes a separate offense by incorporating within its provisions any and all state statutes which prohibit gambling, that such unduly violates the double jeopardy clause of the Fifth Amendment as that principle has been elucidated in *Ashe v. Swenson*, 397 U.S. 436, 9 S.Ct. 1189, 25 L.Ed. 2d 469 (1970).

Under 18 U.S.C. § 1955, an individual must violate a state gambling law, and that gambling law is incorporated into the federal statute for the purpose of establishing illegality. *Ashe, supra*, held that the rule of collateral estoppel was mandated by the double jeopardy provision of the Fifth Amendment. *Ashe, supra*, held that a defendant could not be tried twice under the *same statute* for any acts included in the statute which occurred during the commission of the crime. Consequently, if the defendants were tried under the Colorado Gambling Statutes in a Colorado State Court, it would appear that they could constitutionally later be tried in Federal Court for a violation of Section 1955, because this is the apparent meaning of *Abbate, supra*, and *Bartkus, supra*. However, *Ashe* compels the conclusion that an individual may not be tried twice under the same statute. Since Section 1955 is in fact the same statute as the Colorado State Gambling Laws, it would be constitutionally impermissible to try the defendants in federal court, for the trial would collaterally estop all issues with respect to the Colorado statutes. Since the Colorado statutes are incorporated into the Federal statutes, state-federal or federal-state prosecutions would create the following situation: at the first trial, an acquittal would be a bar to any second trial, but a conviction would be *res judicata* as to the defendants' violation of Colorado state laws in any second trial. This would have the effect of criminally prosecuting the defendants for a crime of which they are already legally conclusively guilty, under *Ashe v. Swenson, supra*, clearly a violation of the Fifth and Fourteenth Amendments.

The conflict between the *Abbate-Bartkus* decisions and *Ashe* is one created by Congress by virtue of the enactment of 18 U.S.C. § 1955. Congress has no power to enact laws which violate the constitutional mandate of the Supreme Court of the United States. Therefore, a statute which creates such a constitutional violation is itself unconstitutional.

This issue has never been faced before, because no other act of Congress has incorporated within it a state statute without either pre-empting the field of legislation or imposing the specific burden on the federal government of proving an additional element of the crime which is in itself a federal question over which the states have no jurisdiction. For example, the Assimilative Crimes Act of 1948, 18 U.S.C. § 13, provides for the incorporation into federal law of state laws only on federal property over which the state has no jurisdiction. Therefore, no *Abbate-Bartkus — Ashe* conflict can arise. The same is true of all other federal assimilative criminal laws which we have been able to find: 27 U.S.C. § 122, which prohibited transportation of liquor from one state into another to be used in violation of the laws of the state; the Ashurst-Sumners Act, 18 U.S.C. §§ 1761, 1762, prohibiting the transportation of convict-made goods across state lines where the goods are used in violation of state law; 18 U.S.C. § 1952, the Travel Act, prohibiting traveling in interstate commerce to promote gambling which is a violation of the laws of the state where it occurs.

It is patently evident that 18 U.S.C. § 1955 contains none of the elements of the above-cited statutes which might insulate it from the *Abbate-Barkus — Ashe* constitutional clash. Therefore, Section 1955 invites double jeopardy in violation of the Fifth and Fourteenth Amendments and is consequently unconstitutional.

B. *In view of the evidence of widespread pre-trial publicity directed toward the Smaldone defendants, it was error for the trial court to deny defendants' motion for a change of venue.*

At the time of the trial in the Federal District Court for the District of Colorado in this matter, the name "Smaldone" was neither new or unfamiliar to either the Court or the people of Colorado. Numerous newspaper articles and other forms of mass media had, well in advance of the time of trial, conditioned the people of Colorado to associate the name "Smaldone" with crime and violence.

In May of 1971, Research Services, Inc. conducted a poll of a representative cross-section of the inhabitants of the Denver area, and a name-association test was given to this representative sample; revealing that fifty-six percent of the registered voters in the Denver Division of the United States District Court for the District of Colorado associated the name "Smaldone" with both crime and violence. Three out of four voters identified the name Smaldone with crime and six out of ten registered voters associated violence with the name "Smaldone." Since May of 1971, there is no reason to believe that the prejudice shown by that poll taken in that year was anything but greater during the year 1972 in view of the massive publicity in the entire state of Colorado linking the Smaldone name with criminal activity. Simultaneous with the indictment in this case, there was released by a local branch of the National Council on Crime and Delinquency, a report entitled *Colorado — Target of Organized Crime* and sub-titled "Crooks, Crime and Colorado." The entire report emphasized the Smaldones as the leaders of organized crime in Colorado, and was riddled with unfounded references to the Smaldone activities. The report was indiscriminately circulated in the Colorado area at $3.00 per copy. Excerpts from this report are reproduced in Appendix A and attached to this Petition.

In view of the existence of such overwhelming and prejudicial pre-trial publicity, defense counsel moved for a change of venue pursuant to Rule 21 of the Federal Rules of Criminal Procedure. The motion was denied.

The concept of a fair and impartial trial free from the passion and prejudice of pretrial publicity is deeply rooted in our system of criminal justice. As early as the year 1907, this Court, speaking through Mr. Justice Holmes, expressed the following principle regarding a fair and impartial trial:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. State of Colorado, Ex Rel Attorney General*, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L. Ed. 879 (1907).

In view of the fact that "legal trials are not elections, to be won through the use of the meeting hall, the radio, and the newspaper . . .", *Bridges v. State of California*, 314 U.S. 252 at 271, 62 S. Ct. 190 at 197, 86 L. Ed. 192 (1941), the Supreme Court of the United States has reversed criminal convictions obtained in trials which have been heavily publicizied and highly sensationalized. *See e.g., Estes v. State of Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

In the instant case, the extensive publicizing of the name Smaldone in the State of Colorado had indeed "set the community opinion as to guilt." *Estes v. State of Texas, supra*, 381 U.S. at 536.

In *Sheppard v. Maxwell, supra*, after enumerating several instances of prejudicial pretrial publicity of the case, the Court held that the failure of the presiding judge to protect the accused from inherently prejudicial publicity which had saturated the community deprived the defendant of a fair trial consistent with the requirements of due process of law. The Court further noted:

> "But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudical outside interferences." 384 U.S. at 363.

Under the facts of the instant case, it is clear that it was impossible for the Smaldones to obtain a fair and impartial trial in the District of Colorado. Consequently, defendants' motion for change of venue should have been granted, it being error for the trial court to have denied the same.

C. *The summary exclusion from the jury panel of all prospective jurors who admitted having even heard the name Smaldone violated the prospective jurors' First Amendment right and the defendants' Sixth Amendment rights to an impartial jury.*

Before the commencement of the trial of this matter, defense counsel moved for a change of venue on the grounds that certain pretrial publicity operated to effectively deny defendants their right to a fair and impartial trial in the District of Colorado. In denying that motion, the trial court made the following ruling:

> "I shall dispose of this Motion first. The Motion will be denied because I think counsel misapprehend constitutional right to due process in that it relates to publicity.
>
> The First Amendment to the Constitution also affects the public and, therefore, the public have the right to know and the newspapers have a right to publish and other news media have a right to print." (Official Transcript, August 25, 1972, at 110; hereinafter referred to as "T.R.").

The First Amendment, held the Court, protected the news media's right to publish and equally protected the average citizen's right to know. Therefore, the First Amendment's protection of all the people was deemed to have precedence over the defendants' request that they be tried in another district.

However, the Court on the first day of trial set about on its own motion summarily to exclude from the venire every potential juror who had ever in his life read anything in any newspaper or heard anything on any news broadcast or seen anything on any television program which related in any way whatsoever to the pending trial or to any of the defendants in the trial. All defense counsel joined in strenuous objection to this summary exclusion of over one-half of the jury panel. In contrast to its

earlier ruling that the people have a right to read and hear and think, the Trial Court discharged out of hand every person who exercised that right:

"THE COURT: What is the position? I can't follow counsel.

MR. FLYNN: Simply this, that the defendants are entitled to a cross-section of the community, and by segregating those who apparently do not have the intelligence to read some newspapers and do honestly express that they have read something about the case and have some memory retention, that the defendants are not receiving a fair cross-section by way of jury selection, if we exclude all persons whon indicate enough intelligence to be aware of current affairs.

"THE COURT: Then do I understand that counsel for the defense prefer that we put all the names of the jurors presently in the courtroom in the wheel and select from that group?

"MR. GERASH: Yes."

. . . (T.R. September 19, 1972 at 68-69).

"MR. GERASH: Your Honor, I have a slight disagreement with my brother.

"THE COURT: All right.

"MR. GERASH: I feel that the Court for the purposes of inquiring into reading newspapers has done it adequately as far as my client is concerned, and therefore I don't want to be deprived of a cross-section of all the jurors, and I will object to any utilization of any segregated jurors. I would like a random wheel of all the jurors that the Court has interrogated now, and I think I would be willing to not press the Court to ask further questions concerning further publicity other than the questions we propounded to the Court, which I know the Court will inquire when they get them in the box, but I feel that I am not being deprived of undue publicity at this time, prejudicial publicity, by the Court not going into that area, but I do want the other jurors who are perceptive or well read or who are in my opinion very honest to constitute part of the panel. I feel that those

jurors who have never heard or don't remember are really not an adequate cross-section of the jurors, so I would want the Court to select a panel from the jurors, all the jurors.

"THE COURT: Well, the very purpose in calling so many jurors was trying to get a group, none of whom heard of this case, at least to the extent that they have any recollection of it.

"MR. GERASH: But those weren't prejudiced. The ones who actually heard it said they actually wouldn't be prejudiced, and some of them I sincerely believe, and I feel that the Court should take from them also.

"THE COURT: Well, I think I will take from those who have not — are these on the left side in any order separated now?" (T.R. September 19, 1972 at 70-71).

The trial court's summary exclusion from the jury panel of all prospective jurors who had ever read or heard of any of the codefendants not only violated those prospective jurors' First Amendment right to know and read the newspapers, but additionally violated the defendants' constitutional right to a jury impartially drawn from a cross-section of the community:

"The constitutional question is whether the jury must be 'impartially drawn from a cross-section of the community,' or whether it can be drawn with systematic and intentional exclusion of some qualified groups, to use Mr. Justice Murphy's words in his dissent in Fay v. People of State of New York, 332 U.S. 261, 296, 67 S. Ct. 1613, 1631, 91 L. Ed. 2043.

Fay v. New York, which involved a conviction of union leaders for extortion, was the 'blue ribbon' jury case in which the jury was weighted in favor of propertied people more likely to convict for certain kinds of crimes. The decision was 5-4, Mr. Justice Murphy speaking for Mr. Justice Black, Mr. Justice Rutledge, and myself:

'There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-

> section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people.'" *Witherspoon v. Illinois*, 391 U.S. 510, 524, 88 S. Ct. 1770, 1778, 20 L. Ed. 2d 776 (1968). *See also Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220, 66 S. Ct. 984, 985, 90 L. Ed. 1181 (1946); *Smith v. Texas*, 311 U.S. 128, 130, 61 S. Ct. 146, 165, 85 L. Ed. 84 (1940).

D. *By instructing the jury that when a "person conducted a part of the gambling business, he 'ran the risk' that it might involve five or more persons . . ." the trial court erroneously instructed the jury on the elements of specific intent.*

The trial court, in instructing the jury with regard to the requisite intent that must be shown in order to find any defendant guilty, properly offered the following instruction:

> "Every person who thus wilfully participates in the commission of a crime may be found to be guilty of that offense. Participation is wilful if it is done voluntarily and purposely and with specific intent to do something which the law forbids or with specific intent to fail to do something which the law requires to be done, that is to say with a bad purpose, either to disobey or to disregard the law." (T.R. September 28, 1972 at 1315.)

Having properly instructed the jury with regard to the element of specific intent on the part of each defendant, the court went on to offer this further instruction:

> "If you find that any person named as a defendant in these counts was engaged in the conduct of an illegal gambling business at least in part, it does not matter under the law that he may not have known all the participants in the particular gambling business or known that it was a business which was being conducted by five or more persons. If that

person named as a defendant conducted a part of the gambling business, he *ran the risk* that it may involve five or more persons and the further *risk* that the business had been or remained in continuous operation for a period in excess of thirty days or that it might have a gross revenue in excess of $2,000 in any single day." (T.R. September 28, 1972 at 1321). (Emphasis added).

Not only was such an instruction highly confusing to the jury when coupled with the Court's previous instruction on specific intent, but it additionally misstated the law. 18 U.S.C. § 1955 forbids only those gambling businesses which include five or more persons. Consequently, the substantive crime prohibited by § 1955 is one which must be perpetrated by at least five principals. Clearly then, each principal must possess the specific intent to commit the particular felony charged. Thus, the instruction that one who conducts a part of a gambling business *runs the risk* that there are five or more persons engaged in the activity is clearly an erroneous definition of criminal intent which has no place in 18 U.S.C. § 1955.

The clear implication of the court giving the above-quoted instructions is that the giving of the "running the risk" instruction improperly allowed the Government to escape its burden of proving specific intent and substituted for that burden the negligence standard of culpability. By first charging that a defendant must have the requisite degree of specific intent to commit a crime, it is error for the Court then to repudiate that instruction by charging the jury that a defendant may be found guilty of a crime because of his negligence. Thus, petitioners herein submit that the trial court, in giving the above-quoted instructions, clearly failed to fulfill its fundamental obligation to the jury to clearly and explicitly instruct on the law:

"A conviction ought not to rest on equivocal direction to the jury on a basic issue. . . . The government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know

enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach v. United States,* 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (1946).

CONCLUSION

Because of the importance and gravity of the federal constitutional questions raised herein by the petitioners, it is respectfully requested that this Court grant the instant petition for writ of certiorari.

Respectfully submitted,

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December, 1973

APPENDIX A

"Colorado— Target of Organized Crime"
"Crooks, Crime and Colorado"

Page 9. He indicated that the names and telephone numbers of several Coloradans had been found in the papers of Jack Dragna, an alias of Anthony Rizzoti, a Los Angeles, California, racketeer and an associate of the Capone syndicate in Chicago. Among them were Charles Blanda of Pueblo (successor to Carlino); Joseph and Gus Salardino of Canon City; Eugene and Clyde Smaldone of Denver, whom he described as being in charge of gambling in northern Colorado; Frank "Blackie" Mazza who was their "enforcer." We are aware that all of these persons who are still alive 20 years later are of serious concern to law enforcement officers dealing with illegal activities.

Page 26, 27, 28. Most illegal gambling that has come to our attention is within the metropolitan Denver Area. Activity seems to fall within the scope of two structures, each of which is headed by members of the Smaldone family, with varying numbers of associated bookmakers operating within their sphere of influence.[1]

In the first combine are these:
Clyde "Flip Flop" Smaldone
Clarence "Chauncey" Smaldone
Pauline Smaldone (wife of Clarence)
Paul C. "Fat Paulie" Villano (nephew of Smaldone brothers)
Their operatives are these:
Frank "Carlo" Amato
Joseph Briola
Richard Colgan
James Clapes
Donald Deluzio
Frank J. Garceo
Lonnie "Breeze" Garrat
John "Skip" LaGuardia

[1]These lists are only partial, and consist of names taken from public records of recent arrests.

Stanley Lamirato
Anthony Ligrani
Donald R. Meyer
William E. Neeld
Burton Rosen
Charles Willmarth

The second combine has the following as directors:

Eugene "Checkers" Smaldone
Eugene L. "Young Gene" Smaldone

Upper level management is as follows:

Joe "The Ram" Salardino
Michael Tomeo
Guy "Mickey" McNulty
Frank "Blackie" Mazza

Their operatives are these:

Edmund Couch
Frank A. Dardano
Josef Erner
Albert Guarasci
Melvin Hanners
William Kohankie
Leo E. Lane
John "Skip" LaGuardia
Charles K. Lockwood
Darrell C. Miller
Ernest R. Murphy
Donald G. Nelson
Charles "Carl" Smith
Jerry J. Spinelli
Joe "Chubby" Raso
Albert Ursetta
Dennis M. Valley
Doris Valley
Michael J. Valley

* * * * *

In January, 1966, *Clarence Smaldone, Paul Villano* and Joe Salardino were arrested, with others, in the North Side Political Club, 3700 Navajo Street, Denver. Smaldone and Villano were

convicted and both sentenced to 180 days in jail and fined $600. Salardino received a jail sentence and fine of $650. Also convicted were these:

Pete Mazone, 1411 York Street
Robert Quintana, 3930 Shoshone Street
Michael Pauldino, 3544 Navajo Street
Albert F. Guarasci, 3638 Tejon Street

Clarence Smaldone was arrested on gambling charges in November, 1969, at the Hilltop Tavern, 4907 Lowell Boulevard, Denver. The arresting officers stopped a truck being operated by Frank "Blackie" Mazza after Smaldone entered it carrying a bag in which were found football pool cards. In October, 1970, Mazza was granted immunity from prosecution and testified in this matter, but gave answers that were diametrically opposed to previous statements he had made. He was indicted for perjury, tried, convicted and sentenced to a 13-14 year term in the penitentiary. Smaldone was convicted on 5 gambling counts and received a sentence of 300 days and a fine of $1,400.

Page 31, 32, 33. In the second combine the directors are *Eugene "Checkers" Smaldone* and his son, *Eugene L. "Young Gene" Smaldone.* Eugene Smaldone has been involved in many instances of litigation recently, all of which were tried outside of Denver, on a change of venue resulting from a public opinion poll which showed that the name "Smaldone" was associated in the Denver area with crime and violence. Eugene Smaldone was able to have a trial on gambling charges moved to Leadville, Colorado, and his trial with Joe "The Ram" Salardino on loansharking-extortion charges changed to Pueblo, Colorado. Smaldone and Salardino were acquitted of the extortion charges. Although they were convicted on charges of possession of a firearm by a felon in another case, they were eventually acquitted in a U.S. Supreme Court decision in December, 1971.

* * * * *

In 1971 Eugene Smaldone and Spinuzzi were arrested on assault, battery, drunkenness and profanity after a brawl at Nino's Fountain, 114 West 4th Street, Pueblo. Smaldone was jailed for 4 hours on drunkenness.

"Young Gene" Smaldone, 4280 West 66th Avenue, Arvada, had been charged in federal district court with owing $69,684 in gambling taxes from 1960 and 1961. Of this, $16,036 is interest on the tax which is owed.

In May, 1972, Smaldone was arrested on suspicion of importing cocaine from Lima, Peru.

On July 21, 1972, Eugene "Checkers" Smaldone, his wife, Frances, and their son, Eugene L. "Young Gene" Smaldone were arrested with five others by the FBI on gambling charges by a federal grand jury in Denver. Also arrested were Michael Tomeo, Melvin Hanners, Leo E. Lane and Josef Erner all of the combine run by Eugene Smaldone. Listed on the indictment also was Guy "Mickey" McNulty, who was jailed a few days earlier for a maximum 5-year prison term on two charges of evasion of state income taxes.

Charged on the indictment but still at large were the following members of the same combine:

Michael Valley, 5130 East Donald Avenue
Michael J. Valley, 5055 Shoshone Street
Edmond D. Couch, 4347 Vallejo Street
Frank J. Garceo, 3841 Lipan Street

The first charge in the indictment was that the Smaldones, Tomeo, McNulty, Hanners, Dennis Valley and Couch "did knowingly and wilfully conduct, finance, manage, supervise, direct and own an illegal gambling business" which operated from October 16, 1970, until June 30, 1971, and earned more than $2,000 on some days.

The second charge said that all the persons named in the indictment, with the exception of Hanners and Couch, conducted the same kind of operation between August, 1971, and January, 1972.

Page 39. Roma then became the undisputed leader in Colorado, with Eugene and Clyde Smaldone two of his principal associates. His tenure was short lived and came to an end in late 1933 when he was, in turn, assassinated. The two Smaldone brothers were the last persons seen leaving his home before the discovery of his death. The fine machinations in the succession to leadership are obscured by time, but it appears that the dominant figure became Charles Blanda of Pueblo, Colorado. Law enforcement authorities identify the next leader as James "Black Jim" Colletti of Pueblo, who has placed the mantle of leadership over the shoulders of his successors Joseph "Scotty" Spinuzzi, also of Pueblo, and gone into "retirement."

Page 40. *THE 1920's — DAYS OF PROHIBITION*

1923-26 — At least 6 gangland killings in Denver and Pueblo areas, believed to be the result of gangland war between bootlegging rivals.

1926 — Clyde (19 years) and Eugene (16 years) Smaldone arrested for bootlegging and fined $100 each. Ralph Smaldone, their father, had served time for bootlegging.

1929 — Frank "Blackie" Mazza, Denver, sentenced to federal prison for 1 year and 1 day on bootlegging charges.

THE 1930's — THE RISE OF ORGANIZED RACKETEERING

1930 — National gangland war, September 13, 1930. Forty men killed across United States. Peter Carlino killed in Colorado.

1933 — Clyde and Eugene Smaldone, Ralph and Mamie Smaldone (their parents), Alonzo Love, Jr., Louis Brindisi, George Labriola, Bert Capra, Charles Blanda and Thomas "Whiskers" Incerto arrested on federal prohibition violations. Clyde and Eugene sentenced to Leavenworth and fined $1,000 each. Anthony Smaldone sentenced to prison and fined $1,000. Blanda and Incerto also convicted. Federal officials

believed they had crushed the last big liquor ring in Colorado.

1936 — Clyde and Eugene Smaldone arrested for attempted murder of Leo Barnes, rival gambler. Convicted and sentenced to prison 7-10 years.

Page 41. ADAMS COUNTY ANTI-GAMBLING MOVE STARTED 9/43 *Rocky Mountain News*
Clyde and Eugene Smaldone released from prison after serving less than half of their prison sentences.

1943 — CHURCHES ASK GOV. VIVIAN TO CHECK GAMBLING 10/43 *Rocky Mountain News*

1946 — Gov. Vivian promised complete probe of illegal gambling activities in the state, with special emphasis on Douglas and Pueblo Counties.

1947 — New expanded Gaetano's Restaurant and bar opens at 3760 North Tejon Street, Denver, owned by Mamie Smaldone and managed by Ralph Smaldone. Clyde and Eugene Smaldone reported to be making enormous profits from slot machine operations, bookmaking and football jackpot cards.

Page 42. *THE 1950's — EXPANDED GAMBLING AND LENGTHY PRISON TERMS.*

1950 — Kefauver hearings held in United States Senate on national organized crime activities. Virgil Peterson, director of Chicago Crime Commission, testified to links between gambling in Colorado and nationwide crime syndicate. Evidence of connection found in address book of Jack Dragna (alias of Anthony Rizzoti), nortorious West Coast gangster and associate of Capone syndicate in Chicago. Listed among names of leading gangsters from all parts of the country were these Coloradans:

Charles Blanda (successor to Pete and Sam Carlino) of Pueblo; Thomas "Whiskers" Incerto, Pueblo associate of Blanda; Carl Cascio, Pueblo gambler; Joseph "Scotty" Spinuzzi, Pueblo enforcer for Blanda;

Joe and Gus Salardino, Canon City gambling club entrepreneurs connected with Smaldone gambling enterprise in Denver, called, "North Federal Brokerage"; Eugene and Clyde Smaldone, who headed gambling rackets in northern Colorado; Frank "Blackie" Mazza, chief enforcer for Smaldones.

SYNDICATE MORE POWERFUL THAN LAW — DREADED MAFIA DIRECTING BIG TIME CRIME IN THE STATE 11/26/50 *Rocky Mountain News*

Gov. Lee Knous and State Attorney General John Metzger attempted to solve Colorado's gambling problems by trying to call special session of legislature and establishing state-wide crime commission.

1951 — QUIZ BARES SMALDONE LINK IN BIG SCALE WAGERING ON SPORTS EVENTS BETTING 10/31/51 *Denver Post*

Page 43, 44.

1953 — Eugene and Clyde Smaldone, Paul Enrichi, Mike Pauldino and Frank Shutto plead guilty to "simple gambling." Each was fined $150. U.S. Government confiscated $8,338.72 from the first four for back taxes.

Denver Safety Manager William Blood revoked liquor license of Gaetano's Restaurant because of allegations that place was hangout for gangsters, and belonged to Mamie Smaldone in name only.

Eugene Smaldone's tax evasion trial. He failed to appear due to "gall bladder trouble." Smaldone's $10,000 bond was forfeited on order of U.S. Judge Willis Ritter. Trial ended in a hung jury.

Eugene and Clyde Smaldone each sentenced to 60 years in federal prison and fined $10,000 each for jury tampering.

Colorado Attorney General Duke Dunbar claimed organized vice in state ended with smashing of Smal-

done crime empire. Dunbar said state was cleanest in its history from standpoint of organized crime, gambling and vice.

1955 — U.S. Supreme Court reversed Smaldones' jury tampering conviction and freed them from prison.
Eugene and Clyde Smaldone retried on jury tampering charges. They pleaded guilty and were sentenced to 12 years in prison and fined $10,000.
Proposed bill to legalize all Colorado gambling. Backers included Smaldones, Paul Villano, and Joseph Salardino. Bill was defeated.

1956 — BOOKIE RING SMASHED
2/25/56 *Rocky Mountain News*
Clarence "Chauncey" Smaldone arrested for gambling.

* * * * *

1958 — Joseph "The Ram" Salardino, recently moved to Denver, subpoenaed to testify before McClellan Crime Committee in the U.S. Senate. Salardino partner in JC and P Vending Co. with Clarence Smaldone and Paul Villano. Salardino took Fifth Amendment and refused to testify.

Page 45, 46, 47.
THE 1960's — GAMBLING THRIVES. OUTSIDERS EYE SMALDONE TERRITORY WHILE THEY ARE IN PRISON.

1960 — GAMBLING EMPIRE CREATED BY EUGENE AND CLYDE SMALDONE STILL ALIVE IN DENVER 12/11/60 *Denver Post*
Eugene L. "Young Gene" Smaldone (24 years) became active in gambling rackets while father and uncle were in prison. Arrested and convicted for gambling, fined $50.

* * * * *

1962 — Eugene L. "Young Gene" Smaldone convicted of interstate gambling in U.S. District Court. Sentenced to 18 months in federal prison (his first felony conviction).

Eugene and Clyde Smaldone released from Leavenworth after electing to serve extra month in lieu of paying $10,000 fines and taking pauper's oaths to free them of the debt.

1963 — Arrested for investigation of murder of Robin "Walkie-Talkie" Roberts, gambler known to owe large sums of money to other gamblers, were Clyde and Eugene Smaldone, Michael Tomeo, Mike Tate, Guy "Mickey" McNulty, Paul "Fat Paulie" Villano, Joe "The Ram" Salardino and Sam Shanks. All were released but Shanks, who was later acquitted, leaving the murder unsolved.

* * * * *

1966 — Raid at North Side Political Club, 3700 Navajo Street, Denver, resulted in arrest of 24 men, charged with illegal gambling. Clarence Smaldone charged with operating gambling house.

The following were convicted of frequenting a gambling establishment, sentenced to 6 months in jail and fined $600; Clarence Smaldone, Joe Salardino, Paul Villano, Pete Mazone, Robert Quintana, Mike Pauldino, John Rossomano, and Albert Guarasci.

* * * * *

1968 — Clarence Smaldone and Paul Villano pleaded guilty to gambling. Charges stemmed from arrests at Gaetano's in what police called a $100,000 a week operation. Each sentenced to 90 days in jail.

RACING COMMISSION FOREVER BANS TWELVE MEN INCLUDING SMALDONE BROTHERS FROM STATE'S RACETRACKS
7/26/68 *Denver Post*

* * * * *

1969 — Denver Police uncovered vast statewide "Football Forecast" gambling operation run by Clarence Smaldone and Frank "Blackie" Mazza out of the Hilltop Tavern, 4907 Lowell Boulevard, Denver.

* * * * *

1970 — Darlene's Ice Cream Parlor incident took place on

April 13, 1970. Joseph Nuocci was shot ,with resulting charges against Eugene "Checkers" Smaldone and Joseph "The Ram" Salardino, on possession of a gun by a felon and loansharking and extortion. Darlene's Ice Cream Parlor was owned by Michael Pauldino, and was destroyed later in an explosion and fire.

Page 48.

1971 — SMALDONES AND OTHER AREA GAMBLING FIGURES INDICTED BY GRAND JURY
2/6/71
Rocky Mountain News

Page 49. Eugene "Checkers" Smaldone and Joseph "The Ram" Salardino acquitted of federal charges of extortion.

* * * * *

1972 — Eugene L. "Young Gene" Smaldone arrested on charges of smuggling large quantity of cocaine into Colorado from Peru, a federal violation.

Fifteen Denver-area gambling figures arrested by FBI on charges of federal gambling violations. Included were these: Eugene "Checkers" Smaldone, his wife Frances, son Eugene L. "Young Gene" Smaldone, Mike Tomeo, Guy "Mickey" McNulty, Melvin Hanners, Leo E. Lane and Josef Erner, and others.

Pages 58, 59, 60, 61, 62, 63.
CLYDE "FLIP-FLOP" SMALDONE & EUGENE "CHECKERS" SMALDONE

Clyde Smaldone, 3042 West 41st Avenue, Denver, was born on August 27, 1906, and his brother, Eugene of 4280 West 66th, Adams County, was born July 8, 1910. They are the children of Ralph and Mamie Smaldone, immigrants from Potenza, Italy, who resided at 3247 Osage, in North Denver.

In this day of understanding we recognize some connection between social conditions and youth crime, and we note that both Smaldone brothers would have been in formative years dur-

ing the Noble Experiment of National Prohibition. However, we cannot overlook the fact that many contemporaries of the Smaldone brothers, who came from the same area of town, have become successful and prosperous leaders of Denver's business community, operating entirely within the law. It is recalled by some of these contemporaries that the Smaldone brothers chose as a hero symbol, Al Capone of Chicago, and held him in high esteem.

Clyde was placed on probation at the age of 12, and six months later was sent to the state industrial school for boys at Golden. Eugene was sent to the state industrial school at age 15 for "taking accessories from an automobile," and was convicted of his first felony two years later when he admitted stripping 25 cars. By 1930 when Clyde was 24, and Eugene was 20 the former had 14 police blotter entries and his younger brother was not far behind with 11.

By 1930 bootlegging was the major interest of organized gangs in Colorado. Some of them set up an "insurance" business where the people who were bringing alcohol into Colorado from Wyoming and other nearby states could pay fees not to have their operations hampered. Those who refused to do so would have their trucks hijacked, with the hijackers benefiting from the knowledge that their victims could hardly report the loss of illegal contraband to any law authority. Sam and Peter Carlino of Trinidad were principals in bootlegging and insurance against hijacking, and the Smaldone Brothers came within the Carlino sphere of influence at this time.

When the senior Carlino was murdered in 1931 the Smaldone brothers were among those questioned, because of their close relationship to him. The mantle of leadership apparently fell upon Joe Roma, and the Smaldones became closely associated with him. On February 18, 1933, Roma was murdered in his home. His wife testified that he never admitted unknown persons into his home, and that the only visitors Roma had that day were the

Smaldone brothers and Louis Brindisi. The Smaldones were questioned, but released for lack of evidence. Roma was buried with the full pomp and circumstance usual to gang leaders in that era, in a $3,000 coffin, 12 truckloads of flowers and thousands of spectators. Among the pallbearers were Charley Blanda and Tom "Whiskers" Incerto of Pueblo and Joseph Salardino from Canon City, now advisor to Eugene "Checkers" Smaldone.

In May, 1933, federal agents arrested the Smaldone brothers and their parents for violation of alcohol laws. The brothers agreed to plead guilty if charges against their parents would be dropped. They were fined $1000 and sent to Leavenworth prison. At the time of sentencing Federal District Judge J. Foster Symes said, "My only regret in this case is that the owners of the still didn't kill you all off. That would have saved the government the expense of bothering with you." This was in reference to an occurrence at Florrisant, Colorado, where the operators of a still engaged in a shoot-out with the Smaldones and their associates who were trying to move in on them. The jurist's sentiments have been echoed by others in law enforcement in the intervening decades.

When national prohibition ended, gambling came into its own as a money maker for crime syndicates. While Clyde and Eugene were serving their prison sentences, Ova Elija "Smiling Charlie" Stephens came into local prominence in this field. As soon as the Smaldones were released they became associated with Stephens, ostensibly as "dealers," but it appeared that their true value to him lay in the fact that they had reputations as tough and ready men in a fight. Stephens had a minor partner named Leo Barnes who had come from crime circles in Kansas City and St. Louis. Barnes decided to branch out with a gambling club of his own despite his partner's warning that this might not be a healthy thing to attempt. Barnes did seek permission to carry a gun for his self-protection. On December 8, 1936, Barnes entered his car which was parked in front of his home, stepped on the starter

and was blown through the roof by a homemade bomb. Miraculously, he survived.

One witness identified Gene "Checkers" Smaldone as the man seen "working" on the Barnes' car just before the blast. A police officer had seen Clyde leave a telephone booth in the neighborhood of the bombing at about the time of the bombing. The call was linked to Stephens, and the three men were charged with Assault to Murder and Conspiracy to Murder. Successfully prosecuted by Denver District Attorney John A. Carroll (later U.S. Senator), they were sentenced to terms of from 7-10 years by District Judge Henry A. Hicks. At the same time Clyde drew an additional term of 4 to 6 years for stealing a popcorn truck loaded with merchandise.

In prison the Smaldones avoided becoming enmeshed with any groups of prisoners, and were model inmates and became "trustees." Checkers distinguished himself on one occasion by rescuing Warden Roy Best's two children from an inmate who had become drunk and violent and who was threatening them. Later Best and his family dined several times at Gaetano's Restaurant in Denver as guests of the Smaldones.

Releaed from prison in 1943, the Smaldones became involved in the operation of slot machines, then legal in Colorado. In 1949 a Denver County Grand Jury subpoenaed the brothers who refused to testify. The District Attorney at that time had identified slot machines as an enormous money-making proposition for organized crime. The grand jury revealed that the Smaldone Brothers had grossed well over one million dollars in 1949 from gambling operations. Powerless to act under state laws, the grand jury passed on its evidence and findings to a federal grand jury.

Their income from slot machines somewhat threatened, the Brothers turned to the operation of floating barbuit games centered mostly in Louisville and Adams County. When a raid showed that the barbuit tables were electrically rigged so that the dice could be controlled, they were charged with operating a confidence game, but were acquitted.

In 1953 both brothers were charged with income tax evasion based on their gambling incomes. It was estimated at that time that the citizens of Colorado had spent over $50,000 bringing the two to court, and that they had spent nearly 5,000 days between them, in federal, state and county jails. The first trial on income tax charges ended in a hung jury, and a new trial date was set. One week before the trial was to begin, they were indicted for tampering with the jury in the first trial. A United States District Attorney, Charles A. Vigil, who was the prosecutor, received a number of threats against his life, but nonetheless bravely continued the case successfully. The Smaldones were convicted on October 29, 1953, and sentenced by Judge Willis Ritter to 60 years and fines of $24,000 each. Highly talented and respected lawyers defended the Smaldones. This fact indicates the ability of organized crime to afford the best. The two began their sentences while an appeal was made by the following lawyers:

A. X. Erickson
W. H. Erickson
Frederick E. Dickerson
T. J. Morrissey
William F. Dwyer

The case was carried to the U.S. Supreme Court, which ordered a new trial for the Smaldones and their two co-defendants Frank "Blackie" Mazza and Paul "The Harp" Enrichi, specifically ordering that a different judge hear the re-trial. The two Smaldones pleaded guilty to jury tampering and other charges against them were dropped. U.S. District Judge William Leo Knous sentenced them to 12 years in Leavenworth and fines of $10,000 each. They served from August, 1955, to October, 1962, when each elected to take a pauper's oath and serve one extra month in lieu of paying the $10,000 fine. It is our understanding that the law requires them to pay that sum if they ever get that much money together. Despite their high incomes, the debt has never been paid.

Since the 1960's it is believed the two brothers have operated relatively independent of each other, allegedly because of an

argument over Eugene "Flipper" Smaldone, Jr., who does not get on well with his uncle, Clyde.

In recent years Clyde is believed to have reduced his activity in his sphere. He is generous to Our Lady of Mount Carmel Church, and rumors indicate he has bid $1,000 for several successive years for the high privilege of carrying the statute of St. Rocco in the annual Potenza Lodge Parade, with proceeds going to the church.

In September, 1970, Eugene "Checkers" Smaldone was tried in the U.S. District Court on a charge of extortion along with Joseph "The Ram" Salardino. The principal witness against them was Joseph Paul Nuoci who testified that the two had shot him in an argument over money Nuoci owed after they set him up in the loanshark business. He testified further that he had booked bets for "Checkers" and had been taken by him to Pueblo to meet James Colletti and Joseph Spinuzi, the top men in the Colorado "family." Smaldone and Salardino were acquitted in this case.

The defense team pleaded for light punishment in this case because their defendants came "from poor families," and there was no truth linking their clients to a criminal syndicate. Indeed, another member of the defense team, lawyer George T. Evans, stated that there wasn't any gambling going on in Pueblo. "If anyone can find any gambling in Pueblo I'll put in with them," Evans stated, "I know there isn't any. As far as organized gambling is concerned, that's the biggest pipedream that ever came down the pike." Blanda had no comment to reporters who inquired about a petition drawn up by a group of influential businessmen in Pueblo appealing to the presiding judge to grant probation.

The men served short of three years and were paroled in March, 1956, remaining on parole until two years after their sentences would have expired.

In 1964, Incerto was convicted for procuring an abortion on an 18-year-old Florence, Colorado, woman. He was sentenced to a term of from 4 to 10 years. In 1968 certifications were made to

Governor John Love that Incerto was suffering from cancer of the larnyx. It was suggested that it would be an act of mercy to let him die at home, rather than in prison. Incerto was released on July 12th of that year. Responsible citizens in Pueblo indicate that he is seen daily on the streets of that city apparently enjoying good health, more than four years later.

On May 9, 1971, Incerto was one of 16 Pueblo residents found guilty on gambling charges.

In November of 1970 Incerto and District Judge S. Philip Cabibi were indicted by an El Paso County grand jury on charges of bribery and conspiracy. They were accused of demanding and accepting a bribe for the 5-year probation given by Cabibi on March 26, 1970, to Melvin Laverne McCallon, 36, of St. Joseph, Missouri, a convicted narcotics violator.

Judge Cabibi was found innocent of bribery and conspiracy charges. Incerto was found innocent of bribery but guilty of conspiracy. He was sentenced to a term of from 6 to 10 years in Colorado State prison. He is appealing this sentence on the theory that he couldn't conspire by himself.

At the present time "Checkers" is facing gambling charges which will be tried in Leadville, Colorado, after a change of venue was granted when defense counsel showed that a majority of Denverites polled associate the name Smaldone with crime and violence.

On July 21, 1972, the FBI arrested eight Denver area residents and indictments were issued for seven more on charges of conducting gambling operations in violation of federal law. Among those arrested were Eugene "Checkers" Smaldone, his son Eugene "Flipper" and "Checkers" wife Frances. The charges involve illegal gambling operations which earned more than $2,000 on some days.

Page 65.

August, Robin "Walkie-Talkie" Roberts was found in a pit

1963 in Jefferson County, savagely beaten and then shot to death. He had recently been convicted on a federal gambling charge, was reputed to owe $60,000 in gambling debts and had consented to testify for the goverment against "Young Gene" Smaldone and Donald D. Ryan, in a trial that was to begin 10 days after his murder. Roberts had last been seen in the company of Joe "The Ram" Salardino, a close associate of Eugene "Checkers" Smaldone, at the Navarre Cafe, 1727 Tremont Place, Denver.

Indicted for the murder was Sam Shanks whose auto tires matched tracks found at the scene of the murder, and whose shoes bore mud similar to that found at the scene. A gun with blood on it was found in his car. His trial began on January 16, 1964, but four key witnesses, Eugene Smaldone, Joe Salardino, Guy "Mickey" McNulty and Shanks' nephew Robert, who operated the Glass Hat Bar at 1630 Broadway, all refused to testify. Testimony at the trial revealed:

a. Sam Shanks was a Denver syndicate moneylender.

b. He had been sent to Denver in 1962 to represent interests of John J. Vitale, St. Louis syndicate leader, in Denver rackets.

c. Sam Shanks had been a gambler and stickup man for the St. Louis syndicate.

d. Vitale had been seen in the company of Clyde Smaldone and Joe Salardino in St. Louis during 1963.

Shanks was acquitted, and returned to St. Louis where he was employed as a steamfitter.

Page 69, 70. In Colorado we are disturbed by an apparent inability of those who administer the law through regulatory agencies to keep people with questionable records out of government-licensed businesses. For instance, in Denver people who have been convicted of violating gambling and other laws nonetheless can be licensed to operate premises that sell alcoholic beverages.

John "Skip" LaGuardia, a convicted gambler, owns the Alpine Inn, 3551 Tejon Street. Convicted gambler Arthur Dachman, an associate of the Smaldone Brothers, owns the Hilltop Tavern, 4907 Lowell Boulevard. Members of the Smaldone family own Gaetano's Restaurant, 3760 Tejon Street. Members of the Spinuzzi family own Nino's Fountain, 114 West 4th Street, Pueblo, Colorado. The Banjo Bar which has an unlisted phone number and address is run by Louis Francisco and Domenic LaRocco, who have been convicted of selling machine guns. Michael Pauldino, owner of Darlene's Ice Cream Parlor, 1500 West 38th Avenue, which was destroyed in an unsolved bombing and resulting fire in 1970, is now serving a prison sentence at Leavenworth for interstate gambling. He has indicated that he expects to build a new restaurant at that site to be known as the Italian Village. It is not known when Pauldino will open his new restaurant, since he faces a six-seven year prison term in Colorado State Penitentiary on a burglary conviction after he completes his three-year term in Leavenworth.

The Mayflower Hotel, 17th Avenue and Grant, is owned by Lad A. Felix, an associate of Paul Villano and the Smaldone brothers. Felix has been a prime mover in the circulation of petitions calling for a referendum that would grant a privately-owned corporation a 10-year exclusive franchise for the operation of a legalized gambling operation. Some of these petitions were circulated by Anthony Smaldone, and all of them are now in the possession of the District Attorney's Office, Denver County, by court order in connection with a grand jury investigation.

* * * * *

Recent court rulings in the area of pornography have changed legal definitions and relieved sanctions. This has made pornography "legitimate," as well as a financially attractive business for organized crime throughout the United States, and we note that in this regard Colorado again fits a national pattern. Many organized crime figures are involved in pornography in Colorado.

Melvin Hanners, a convicted gambler and associate of the Smaldones and gambler Mickey McNulty, is the owner of the Old Chelsea Theater in Denver, which specializes in "skin-flicks."

Page 73, 74. Judy Good, 1201 Cralkson Street, a girlfriend of Eugene L. "Young Gene" Smaldone, is a stockholder of Interstate, Mile High, and Cloverleaf dog tracks. She was the only woman among a group of twelve people banned "forever" by the Racing Commission from the state's pari-mutuel tracks in 1968. Good, a member of the National Coursing Association since 1967, was reinstated at the tracks in 1969, when she indicated under oath that she had divested herself of her greyhound interests in the state. It seems somewhat incongruous that as a dog owner she could not go to a track, but when she testified under oath that she had divested herself of such ownership, she could then attend.

Since that time, Good has purchased other racing dogs. In 1971, a Racing Commission hearing revealed that she had imported several dogs from Ireland and had supposedly sold them to an Arizona dog owner, Gene Vale. It was later disclosed that Judy Good and "Young Gene" Smaldone had hidden interests in the dogs which Vale was racing at Interstate. Vale was suspended by the Commission from racing dogs in Colorado for the rest of 1971 because of his unwillingness to reveal the true ownership of his dogs. This suspension was reversed soon after that by Denver District Court Judge Edward Byrne, who claimed that Vale was not afforded due process in the Racing Commission action.

As mentioned above, the Colorado Racing Commission in 1968 banned "forever" from the pari-mutuel tracks of the state, twelve gamblers. At the time, it was noted that all of them had long police records, including arrests and convictions for bookmaking, according to commission officials. The action was taken on the basis of a state law empowering the commission "to exclude from all licensed race courses any person whom the commission shall deem detrimental to the best interests of racing."

The twelve gamblers who were banned were these:

1. Clyde "Flip-Flop" Smaldone
2. Eugene "Checkers" Smaldone
3. Clarence "Chauncey" Smaldone
4. Eugene L. "Young Gene" Smaldone
5. Paul C. "Fat Paulie" Villano
6. Judy I. Good
7. Joe "The Ram" Salardino
8. George Peters
9. Michael Anthony Tomeo
10. Pete Matthew Mazone
11. Albert Frank "Squatash" Guarasci
12. Guy "Mickey" McNulty

In 1971, it was learned that three female Smaldone relatives, Mildred (the wife of Clyde), Pauline (the wife of Clarence), and Corrine Smaldone Villano, (mother of Paul and sister to the Smaldones) all held shares of Interstate stock. At that time all the commission could do was to "request that they, and Judy Good, mentioned above, sell their shares. As far as is known, they have not elected to honor this request. Relatives of Pete Mazone (now deceased) and Mike Tomeo also hold stock in Interstate.

A Colorado Supreme Court ruling in January of this year invalidated the section of the state statute which empowered the Commission to exclude persons "who shall wilfully violate any law of the United States or the State of Colorado," after an appeal by the Racing Commission on a decision by late District Court Judge Edward J. Keating. The Supreme Court opinion stated that authority to exclude "any person who shall willfully violate any federal or Colorado law is far too broad to be constitutionally valid." The decision by Judge Keating had reinstated "Young Gene" Smaldone to the tracks . . . .

Page 81. In May of 1972, Eugene Smaldone, Jr., and Larry A. Merkowitz, a Denver pharmacist, were arrested in Denver after accepting delivery of suspected cocaine imported from Peru.

Another Colorado associate of the above two and a Californian were arrested in Lima, Peru, as part of the same overall transaction.

Page 84, 85. In some cases, even when they are fined, organized crime figures do not pay, or pay a small amount. Eugene and Clyde Smaldone were fined $1000 each during bootlegging days in Colorado and have not yet paid these fines completely. The two Smaldone brothers were fined $10,000 each in their jury tampering conviction in 1955; they declared themselves legal paupers and unable to pay these fines in 1962 and elected to serve an additional 39 days in prison each rather than pay the money. That did not entirely free them from the debt; the law states that the brothers are obligated to pay the fines if ever they are able.

Page 86. Other judges have also had the opportunity to sentence organized crime associates to meaningful jail terms. In 1970, Clarence "Chauncey" Smaldone, Frank "Blackie" Mazza, Arthur Dachman, Leonard Eastman and Helen Schamp were all arrested in conjunction with a statewide "Football Forecast" gambling operation, run out of the Hilltop Tavern, owned by Dachman and where Eastman and Schamp were employed. Judge William Conley of Denver County Court, who sentenced Smaldone, gave him the maximum jail term and the maximum fine (Smaldone appealed his conviction). Portions of the trial transcript (over 300 feet) from the gambling trial of Clarence Smaldone were discovered missing — torn off. The Presiding Judge of the Denver County Court, George Manerbino, said, "Somebody had to know which tape they were looking for," . . .

In 1968 Denver County Court Judge Samuel Kirbens sentenced Clarence Smaldone and Paul Villano, arrested at Gaetano's Restaurant in a gambling operation described by police as a $100,000 a week bookmaking ring, to 90 days in jail (maximum $500 and/or 1 year jail).

Page 87.

[1]Although Denver District Judge Robert Kingsley has attempted to inform himself about organized crime, in 1971, in spite of the massive background of arrests for gambling of Clarence "Chauncey" Smaldone and Paul "Fat Paulie" Villano, Judge Kingsley sentenced these two long-time gangsters each to 90 days in jail. (Maximum sentence could have been 2 years jail and/or $1,000.) However, he suspended the sentences on condition they not be convicted of any further charges in the next 90 days. Smaldone's and Villano's convictions were for gambling activities involving a 1969 football parlay card operation which extended into several counties. It had required two years to bring these men to trial for that offense, therefore it would be virtually impossible to convict them of any further gambling offenses, even if they had been arrested any number of times within the 90 days the judge had suspended. *Rocky Mountain News*, 9/21/71.

Page 88.

Case No 1: In March, 1962, Adams County Judge Oyer G. Leary sentenced each of three men to two years in jail after convictions on gambling. They were each fined $200. The two-year sentences were suspended with the provision that the men, Eugene L. "Young Gene" Smaldone, Mike Tomeo and Guy "Mickey" McNulty, not be found guilty of another criminal activity during the next two years.

Did these suspended sentences serve as deterrents to these three well-known organized crime figures? McNulty was at that time serving a two year, 20-day sentence for gambling after conviction in Denver Municipal Court in January, 1962. Tomeo and Smaldone were arrested in October, 1962, May, 1963, and again June, 1963, all within their two-year suspension period.

Page 90. On July 22, 1972, Hanners was arrested by the FBI on charges of violating federal gambling laws, along with 14 others also charged with interstate gambling. The arrests stemmed from an operation which included Eugene "Checkers" Smaldone and members of his family.

Page 91, 92.

1. Denver District Court Judge Edward J. Byrne, in 1971, threw out the suspension by the Colorado Racing Commission of Gene Gordon Vale, a greyhound owner from Phoenix, Arizona, and ordered that the Racing Commission's ban on Vale's racing in Colorado immediately be lifted.

Vale was accused of racing dogs in Colorado, under his title, that were actually owned by Judy Good and Eugene "Young Gene" Smaldone. In February, 1971, judges at the Interstate Kennel Club in Byers lifted Vale's license and banned his kennel from running there; the Racing Commission subsequently held a hearing and upheld the Interstate ban (under the rules governing greyhound racing in Colorado — a violation of rule 13:02-4).

Byrne claimed the action by the Racing Commission against Vale was "outlandish, arbitrary, capricious," and that the Commission did not sustain the burden of proof in banning Vale's dogs. Byrne said "You take an American citizen (Vale), subject him to newspaper publicity, connect his name by innuendo with a notorious person in the community (Smaldone), and say that the only relationship he had to the notorious person was that someone saw him talking to him at a dog track."[1]

However, Byrne did not mention that any connection between Vale and Smaldone was of their own making, not that of the Racing Commission; Vale and Smaldone had had a business relationship since 1970, when Judy Good imported some racing dogs from Ireland and transferred ownership to Vale. Although Vale claimed ownership, evidence showed that ownership and/or control of the dogs was actually in the hands of Good and Smaldone.

Byrne also claimed that the Organized Crime Unit of the Denver District Attorney's office had a hand in the "whole matter . . .however ,they were not brought to testify before the Comission — not one of them except Mulnix."[1] He was referring to an investigation in 1970 of Smaldone, where checks were found

[1]From Court Transcript, 6/4/71.

in a gambling raid on Smaldone's home, made out by Gene Vale and payable to Judy Good, uncashed. These checks were in the exact amounts that Vale's dogs had won at the racetrack. Several documents pertaining to dog ownership were also seized in the raid.

Don Mulnix, head investigator for the Organized Crime Unit, testified (2) that he had found these checks and documents and had notified the Racing Commission of the connection between Gene Vale and Smaldone. Byrne said (3) in his findings, "We have an organized crime unit and they had to justify their existence, so they involve Vale in a press release so they can show the people that they haven't forgotten Smaldones; and that's the whole basis of this case."

Facts indicate that the OCU was involved in the case only in their search of Smaldone's house due to his gambling activities, a year prior to the Racing Commission case; the OCU did not issue any press release concerning this issue.

Page 93.

Byrne also said "The name *Smaldone* has a different meaning in this city. It has great gravity. And we have police officers in Denver who have spent a career investigating but never convicting Smaldones. But I've been in public life for more than 16 years now, and if Mr. Smaldone is in the courtroom, I don't recognize him or any Smaldone. I'm kind of curious as to what a Smaldone might look like, but I've never seen one that I know of. But I know all about their trafficking because it's always in the newspapers, every time they get a traffic ticket."[1]

Page 94, 95.

4. In 1969 the late Judge Edward J. Keating of Denver District Court reversed a 1968 Colorado Racing Commission order

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[1]Court transcript, 6/4/71.

[2]*The Denver Post*, 4/21/71.

[3]From court transcript, 6/4/71.

barring Eugene L. "Young Gene" Smaldone from Colorado racetracks "for the best interests of racing" and because of his criminal background. The Racing Commission has statutory power to exclude from all tracks any person they consider detrimental to the best interests of racing, and the action stemmed from a complaint by the Thoroughbred Racing Protective Bureau, a policing body operating at Colorado racetracks.

Keating held that the grounds for exclusion of Smaldone (other than a 1963 felony conviction) were based solely on "hearsay evidence." Keating also critized the Racing Commission for acting "without a shred of evidence at what they laughlingly called a hearing." However, Keating failed to mention that Smaldone himself was involved in the racing business in a partnership of dog ownership with Judy Good, Smaldone's "girlfriend," who was also one of the 12 persons banned from the racetracks.

Page 99.

II. U.S. District Court Judge Willis Ritter of Salt Lake City, who heard in Denver the Federal jury-tampering trial of Eugene and Clyde Smaldone in 1953, attempted to end the influence of the Smaldone brothers by sentencing each of them to 60 years in Federal prison and fining them $24,000 apiece. This sentence was appealed by the Smaldones to the U.S. Circuit Court of Appeals and then to the U.S. Supreme Court, where eventually it was overturned. In a new trial in 1955, the Smaldones were sentenced by U.S. District Court Judge William L. Knous (of Denver) to 12 years in prison and fines of $10,000 each.

Page 100. In a case believed to be the first of its kind under state revenue laws, Judge Kingsley sentenced Denver gambler Guy "Micky" McNulty, associate of the Smaldones, to two concurrent prison terms of 4-5 years and fined him $10,000. McNulty was convicted of failure to withhold $135 from the salaries of the two bookies employed by him to take telephone bets.

Page 101, 102.

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[1]In January, 1968, five convicted gamblers, all organized crime people, (Clarence Smaldone, Paul Villano, Joe Salardino, Mike Pauldino, Pete Mazone) were all given work releases from the County Jail of Denver. They had begun serving their sentences January 12, 1968, and were denied work releases at that time. However, on January 15 an amended order issued allowing the five to work each day some at extremely strange hours such as 6 p.m. to 6 a.m. The work release order was signed by *Leo Chavez*, Judge Burnett's clerk, who said the matter of work release was "under advisement by Judge Burnett, and that when I received the request from the county jail, by phone, I presumed the judge had allowed it and I sent out the amended order." Sheriff Mose Trujillo, who was then County Jail warden, said the work release request *did not* come from the jail. No one seems to know who made the telephone call, if neither the jail nor the judge had any knowledge of it. Judge Burnett who had been out of town at the time of the incident ordered the immediate revocation of the work release and said the five would not be free any more; he investigated the order request. A subsequent grand jury investigation of Chavez apparently did not produce enough evidence for indictment.

APPENDIX B

United States Court of Appeals

TENTH CIRCUIT

September Term, 1973.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v.	
EUGENE SMALDONE, aka, Checkers,	No. 72-1854
EUGENE LOUIS SMALDONE, aka Young Gene,	No. 72-1855
GUY McNULTY, aka, Mickey,	No. 72-1856
MELVIN DANIEL HANNERS, aka Mel,	No. 72-1857
LEO EDWARD LANE,	No. 72-1858
DENNIS MICHAEL VALLEY,	No. 72-1859
MICHAEL J. VALLEY,	No. 72-1860
JOSEF RICHARD ERNER, aka, Rick,	No. 72-1861
FRANK JOSEPH GARCEO,	No. 72-1862
HARRY ANTHONY VILLANO, Defendants-Appellants.	No. 72-1863

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(72-CR-223)

John J. Flynn, Phoenix, Arizona, (Flynn, Kimerer, Thinnes, & Galbraith and Richard L. Parrish on the brief for Appellants Eugene Smaldone, Eugene Louis Smaldone and Harry Anthony Villano; Leland S. Huttner, Denver, Colorado on the brief for Appellant Melvin Daniel Hanners; Paul E. Vranesic, II, Denver,

Colorado on the brief for Appellant Josef Richard Erner) for Appellants Eugene Smaldone, Eugene Louis Smaldone, Melvin Daniel Hanners, Josef Richard Erner, Leo Edward Lane, and Harry Anthony Villano.

Richard T. Spriggs, Denver, Colorado for Appellant Josef Richard Erner.

H. D. Reed, Denver, Colorado for Appellant Michael J. Valley. Walter Gerash, Denver, Colorado, (Gerash & Gerash, and Louis M. Fischer, on the brief) for Appellant Dennis Michael Valley. Leland S. Huttner, Denver Colorado for Appellant Melvin Daniel Hanners.

Morris W. Sandstead, Jr., Boulder, Colorado for Appellants Guy McNulty and Frank Joseph Garceo.

Richard J. Spelts, Assistant United States Attorney, Denver, Colorado (James L. Treece, United States Attorney, and W. Allen Spurgeon, Assistant United States Attorney with him on the brief) for Appellee.

Before LEWIS, Chief Judge; LARAMORE*, Judge, Court of Claims; and McWILLIAMS, Circuit Judge.

LEWIS, Chief Judge.

This was a criminal prosecution brought on a three count indictment filed in the United States District Court for the District of Colorado. Counts I and II of the indictment charged fifteen defendants with knowingly and wilfully conducting, financing, managing, supervising and directing an illegal gambling business contrary to Colorado law and in violation of 18 U.S.C. §§ 1955 and 2.

Count I covered the time period October 16, 1970 to on or about June 30, 1971 and named eight defendants. Count II covered the time period August 1, 1971 to on or about January 31, 1972 and named thirteen defendants. On count I the jury

*Of the United States Court of Claims, sitting by designation.

convicted appellants Eugene Louis Smaldone (Young Gene), Guy McNulty, and Melvin Daniel Hanners. On count II the jury convicted appellants Young Gene, McNulty, Eugene Smaldone (Checkers), Leo Edward Lane, Dennis Michael Valley (Dennis), Michael J. Valley (Mike), Joseph Richard Erner, Frank Joseph Garceo, and Harry Anthony Villano.[1] In this consolidated appeal under 28 U.S.C. § 1291 theer are ten appellants, two of whom were convicted on both counts of the indictment.[2]

I

THE EVIDENCE

Title 18 U.S.C. § 1955 states:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

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[1]The original indictment named fifteen defendants, but defendants Frances Smaldone, Michael Tomeo and Clifford Emily were severed before the trial commenced. After severance there were six defendants named under count I and ten defendants under count II. Two of the six defendants, Checkers Smaldone and Dennis Valley, named in count I, were acquitted at the close of the government's case, and the jury found defendant Harvey Williams not guilty under count II.

[2]Appellants Young Gene and McNulty were found guilty under both counts of the indictment. Count III of the indictment alleged illegal use of the mail by appellant Lane in violation of 18 U.S.C. § 1302. A judgment of acquittal was entered at the close of the government's case.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

At trial the government attempted in each of the two counts to link five or more persons including some of the appellants to an illegal gambling business which was in operation "in excess of thirty days or [had] a gross business revenue of $2000.00 in any single day." In an attempt to meet the necessary elements of section 1955 the following evidence was produced at trial:

A widespread bookmaking operation involving a number of people in the Denver, Colorado area was in operation between October 16, 1970 and January 31, 1972. The government introduced evidence showing that at the apex of this operation was Checkers Smaldone with Young Gene Smaldone and Michael Tomeo (severed from the original trial) acting as the central bookmakers. The illegal gambling business centered around bookmaking on certain sporting events including college and professional football, basketball, baseball, and horseracing. Because of the seasonal nature of sporting events the indictment was divided into two counts. The first count covered gambling activities beginning with the fall of 1970 and ending June 30, 1971. The second count commenced with the start of the 1971 football season and ended January 31, 1972.

The bookmaking operation encompassed a number of different conductors[3] including: (1) runners (individuals who handled payoffs and collected from betting customers); (2)

[3]The word "conducts" as used in this opinion will follow the definition provided by the authors of 18 U.S.C. § 1955:

The term "conducts" refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance nor the person who participates in an illegal gambling activity by placing a bet. 2 U.S. Code Cong. and Admin. News, 1970, p. 4029.

phone men (the middlemen who received bets from customers and exchanged betting information such as the "line" or point spread); (3) relay or pickup men (higher echelon functionaries who received and consolidated betting information from phone men, enabling phone men to then destroy any tangible evidence); (4) bookkeepers (men who acted as accountants for the gambling operation) and (5) managers (those individuals in supervisory and ownership positions). The purpose of having various categories of conductors was to insulate the more important individuals from the actual operation, and to maintain secrecy through limited encounters between participants.[4]

The gambling operation was of a complex nature. Generally, bets were made at a ratio of 11 to 10 with the odds in favor of the bookmaker. The customer could pyramid his bets by selecting as necessary winners a number of teams, called a parlay, or by reducing or enlarging the point spread established by the "line." A point spread or "line," which often was the basis of betting on football games, was given to customers who were usually also assigned "code numbers."

Weekly sports schedules listing games chronologically by starting times commencing on the east coast and moving west were distributed to participants. These schedules not only identified the teams involved but provided code numbers for the teams and blank boxes for scoring. Though published for sports enthusiasts, these special schedules were very helpful to the gambling operation in keeping track of numerous wagers and improving the exchange of information. With the help of sophisticated sports schedules, bets were placed with phone men and, after the relay men consolidated the various wagers, they were passed on to management." The customer would then have his account tallied on a weekly basis, at which time he would either receive his winnings or pay his losses.

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[4]Sophisticated electronic devices such as telephone switches and radio telephones were used at times throughout the operation to further prevent detection and protect any of the participants from being caught.

The various conductors were paid according to their importance within the organization. Some were provided salaries plus expenses including attorney's fees, bonds, and fines if apprehended by the police. Others were given a percentage of the profits from the customers with whom they dealt and of course the owners of the operation shared in the profits generated by the total gambling enterprise.

A. Count I.

Under count I the government offered evidence showing that the three appellants—Young Gene, McNulty and Hanners—jointly operated a gambling business with at least seven other conductors during the fall and winter of 1970-71. The government produced an array of witnesses including four who played personal roles in the alleged gambling operation. The thrust of their testimony revealed a number of links between various participants in a single gambling operation under the direction of Young Gene.

Larry Laningham, one of the government's major witnesses, testified that he had been hired by Young Gene and McNulty to be a "runner" in a bookmaking organization. Laningham was later elevated by Young Gene to be a relay man and eventually took over as a bookkeeper for the operation. Laningham stated that at various times during the count I period he had contact with all of the appellants as they pursued various aspects of the gambling operation. He also linked the appellants to each other and to other conductors.

The testimony of other witnesses painted the picture of a gambling organization that included a number of participants at various levels and with various degrees of involvement. The gambling activity generally centered around Young Gene Smaldone with appellants McNulty and Hanners playing lesser roles in the total scheme. Evidence was introduced showing that McNulty used Laningham as a driver on collections after hiring him through Young Gene. McNulty also regularly received a

number of schedules from Young Gene through Laningham, and turned any money collected in excess of that paid to customers over to Young Gene through Laningham. Witnesses also testified to having placed bets with McNulty.

Appellant Hanners received bets from a number of customers, and at least on two occasions, personally conveyed this information to Laningham who in turn entered these items in a central set of books he was keeping for Young Gene. Laningham also delivered schedules to Hanners, and received money for Young Gene from Hanners. At trial, evidence seized from Hanners' car was introduced which included, among sports schedules and other items, bookmaking notes containing the names "Mickey," "Gene Smaldone," and "Mike Tomeo."

The common ingredient in the gambling operation was Young Gene Smaldone. Young Gene had hired Don Nelson as a phone man through McNulty. Nelson testified that for a period of time he regularly received calls from Hanners, McNulty, Tomeo and others from whom he received bets and disseminated information. The bets from the customers of these individuals were then relayed to Young Gene. During this period of time Young Gene also acted as the distribution source for sports schedules which were delivered or sent to various conductors. Other testimony showing that Young Gene was deeply involved in the running of a gambling operation included his instructions to Laningham to keep the "figures" in a central set of books and his participation along with Frances Smaldone and Mike Tomeo in actually reviewing the total "figures" received from other participants.

B. Count II.

Count II covers the 1971-72 sporting season and involves a much larger gambling operation than that depicted in count I. Besides the nine individuals appealing their count I convictions, testimony at trial indicates that at least eight other conductors were involved in some aspect of the bookmaking operation. The government attempted to show that Checkers Smaldone was

"chairman of the board" while Young Gene and Mike Tomeo assumed positions as principal administrative officers in the business. Collections for the operation were handled by appellants McNulty, Dennis Valley, Lane, Garceo and Mike Valley while appellants Garceo, Villano, Erner and Mike Valley at various times assumed duties as phone men.

Six individuals who claimed intimate acquaintance with the operation, among a number of prosecution witnesses, testified for the government including Larry Laningham and Linda Tomeo, the wife of Mike Tomeo. Linda Tomeo was deeply involved in the gambling business during the short period that she lived with her husband. She testified to being in the homes and apartments of a number of the appellants, including the Smaldones, when various phases of the bookmaking operation were being pursued. She described in great detail the types of activities she undertook, and with whom, as well as what she observed others do. Laningham at first continued under the same terms as those he received during the count I period. But, Laningham slowly phased out of doing "figures," then relay, and subsequently devoted his time to working with customers for his 20%-80% split. This meant that he was eventually not as involved with the total span of the operation as in the count I period and the initial stages of the count II period.

Testimony of Laningham, Mrs. Tomeo and others was offered to show that Checkers Smaldone took bets and gave out "line" information at his home and, on one occasion, transacted business over a public telephone in a Pueblo, Colorado restaurant. He was usually in the presence of several other conductors including Young Gene. Linda Tomeo further testified that Checkers would often call the Tomeo home seeking information regarding the gambling enterprise. Checkers was generally assisted by Young Gene in the bookmaking transactions and in keeping the "figures." Young Gene also acted as the distributor for the sports schedules used by various conductors. And, on several occasions Young Gene

met with individuals indebted to the gambling operation in order to set up repayment schedules.

Evidence was offered at trial showing that appellant McNulty lived with the Smaldones between November 1971 and January 1972 at which time he did some collection and phone work for the business. Appellant Lane was also involved in collecting money for the operation. In addition, testimony was given that Lane often disseminated sporting schedules to various conductors and participants in the bookmaking operation. For example, Mrs. Tomeo testified that Lane, Mrs. Lane, Mike Tomeo and herself spent an evening preparing a list of betting customers and sending schedules to these customers. Lane also had a subscription to large quantities of sports schedules but abruptly canceled his subscription when the indictment in this case was returned.

Appellants Dennis and Mike Valley were closely connected with the activities of Mike Tomeo. Dennis was often seen with Tomeo and evidence was offered to show that on more than one occasion he helped Tomeo do the "figures." Dennis also helped negotiate a 20%-80% participation arrangement with Dr. Clifford Emily and later assisted Emily with his customers after Emily was hurt in an auto accident. Dr. Emily also worked with Dennis' brother, Mike Valley, who provided Emily with "line" information and on several occasions delivered schedules to Emily's office. Mike Valley was subsequently caught by police at a phone site and his records were seized. The police, acting in Mike Valley's stead, then took 13 phone calls from customers representing approximately $10,350 in wagers. Mike was later released on bond and, according to the testimony of several individuals, again joined his brother Dennis in personally meeting Emily's customers while Emily was convalescing.

Evidence was also offered at trial showing that appellants Erner and Garceo acted as phone men for the gambling operation. They leased a telephone in a witness' apartment for a four- to six-week period beginning in the fall of 1971. The phone was

to be available while the witness was at work and on Saturdays and Sundays. The witness observed Erner in her apartment two or three times during this period. Also, both Mrs. Tomeo and Laningham testified that they received relay information from Erner. In addition to renting the telephone with Erner, appellant Garceo used a private telephone, installed in the rear of a doctor's office, to receive betting information. Garceo obtained permission to use the phone at which time he explained the bookmaking operation to the doctor, and then proceeded to use the telephone for at least two weeks to give out "line" information and take bets. In October 1971 Garceo was apprehended by the police at a phone site along with incriminating sports schedules and other bookmaking notations.

Garceo was replaced at the doctor's office phone site by appellant Villano. Villano worked at the doctor's office for another two weeks giving out and receiving bookmaking information. Laningham also testified to meeting Villano at the doctor's office several times during this period. Villano was arrested upon the execution of a search warrant at the phone site of the doctor's office at which time a number of bookmaking articles were seized. At trial an F.B.I. expert calculated that the minimum wagers found on those items seized in the doctor's office were approximately $12,300.

Testimony was also offered at trial as to the average dollar volumes in wagers under the two counts. Laningham, testifying as to the count I period, stated that he handled about $45,000 weekly during the 1970 football season, $25,000 weekly for the 1970-71 basketball season and $25,000 weekly for the 1971 baseball season. Phone man Lockwood testified that he averaged $2,000 to $4,000 each weekday and $15,000 on weekends during the count I period. One customer acknowledged placing $15,000 weekly bets during the 1970 football season. As for the count II period, Laningham further testified that he averaged $12,000-$15,000 in wagers each week. Jeremiah Sullivan stated that

from August through November 1971 he handled an increasing monetary volume in wagers until he reached an average of $35,000 per week in November. In addition, the records seized pursuant to three search warrants showed that an average of $10,000-$12,000 in wagers was being placed with particular phone men during the count II period.

II

THE APPEAL

The ten appellants have raised a number of issues on appeal. The majority of their contentions are applicable to all appellants, but several issues have specific impact on individual appellants. Those issues of general import therefore will be treated initially, leaving the specific concerns until last.

A. The Constitutionality of 18 U.S.C. § 1955.

Appellants base their challenge to the constitutionality of 18 U.S.C. § 1955 on three grounds: (1) the statute, absent an allegation in the indictment and proof of some interstate commerce nexus, is violative of the tenth amendment; (2) the statute deprives citizens of equal protection of the laws; and (3) it invites double jeopardy. We believe these contentions to be without merit.

Today we join five other circuits in upholding 18 U.S.C. § 1955 as a valid and constitutional exercise of congressional power under the Commerce Clause of the United States Constitution. *See* United States v. Hunter, 7 Cir., 478 F_2 1019; United States v. Becker, 2 Cir., 461 F_2 230; United States v. Riehl, 3 Cir., 460 F_2 454; United States v. Harris, 5 Cir., 460 F_2 1041; Schneider v. United States, 8 Cir., 459 F_2 540. Appellants' argument that the statute as written is unconstitutional because it exceeds the power given to Congress to control activities which affect interstate commerce is foreclosed by the Supreme Court's ruling in Perez v. United States, 402 U.S. 146. *Perez* upheld the constitutionality of a federal statute prohibiting "loan sharking," 18 U.S.C. § 891, *et seq.*, on the basis that activities within a regulated class of activities which do not exceed the reach of federal power under

the Commerce Clause need not be shown, in each individual case, to affect interstate commerce. The Court noted that:

> [L]oan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and rich alike and syphons funds from numerous localities to finance its national operations. 402 U.S. at 157.

This statement applies with equal force to illegal gambling as prohibited by section 1955. We are bolstered in this belief by numerous investigative reports including the President's Commission on Law Enforcement and Administration of Justice which stated that "gambling is the greatest source of revenue for organized crime." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 188 (1967). Congress relied heavily on the President's Report when enacting Title VIII of the Organized Crime Act of 1970, Pub. L. 91-452, of which section 1955 is an integral part. The legislative history of the Act is replete with other examples furnished Congress concerning the detrimental impact that illegal gambling has on interstate commerce. 2 U.S. Code Cong. and Admin. News, 1970, pp. 4007-4091. We therefore conclude that Congress acted well within the bounds of the Commerce Clause and requirements laid down in *Perez* when enacting section 1955.

Appellants also urge that section 1955 is unconstitutional because it denies equal protection of the law through its unequal geographical enforcement. As the law now stands gambling activity conducted in one state may be a federal offense, while the same activity in another state may be sanctioned by the law. Yet, we find that section 1955 is not repugnant to the due process clause of the fifth amendment merely because of this variation in state laws. The Supreme Court answered the argument that Congress' exercise of its power over commerce must be uniform when it stated:

> So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its

> provisions into play, — that its provisions apply to all states, — so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself. . . . [I]t is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it; that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. James Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311, 327.

Section 1955 adheres to the Supreme Court requirements in language and administration because it uniformly applies throughout the United States. *See also* Schneider v. United States, 8 Cir., 459 F. 2 540; United States v. Sacco, N.D.Cal., 337 F. Supp. 521; United States v. Aquino, E.D.Mich., 336 F. Supp. 737; *cf.* Turf Center Inc. v. United States, 9 Cor., 325 F. 2 793.

Finally, it is suggested that section 1955 is an unconstitutional invitation to double jeopardy because it establishes a separate federal offense by incorporating within its provisions all state statutes which prohibit gambling. Appellants argue that under § 1955 a defendant is, in actuality, being tried twice under the same statute. They contend that § 1955, because of its assimilatory nature, is violative of the requirements laid down in Ashe v. Swenson, 397 U.S. 436. In *Ashe* it was held that a single sovereign cannot prosecute for separate offenses occurring in a *single* event where the result of the first prosecution undeniably establishes the innocence of the accused in the second charge. Such is not our case. Here we have the federal government as a *separate* sovereign prosecuting individuals for violation of federal law. It is well settled in the law that neither conviction nor acquittal in a federal or state court bars a prosecution in a court of another jurisdiction involving or arising from the same transaction or event. Bartkus v. Illinois, 359 U.S. 121; Abbate v. United States, 359 U.S. 187. This rule is dispositive of appellants' double jeopardy claim.

B. The Validity of the Colorado Gambling Statutes.

Appellants' second major assignment of error is that Colorado Revised Statutes §§ 40-10-7, 8, and 9 (1963) were repealed on June 30, 1972 and therefore cannot provide the basis for a federal prosecution commencing by indictment on July 14, 1972. The three pertinent Colorado statutes made it a misdemeanor to maintain a gambling parlor, keep a gaming table, or wager upon games.[5]

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[5]The three applicable Colorado statutes state:

40-10-7. Gambling rooms—penalties.—*If any person shall keep any room, building*, arbor, booth, shed or tenement of any description, *to be used or occupied for gambling or shall knowingly permit the same to be used or occupied for gambling;* or if any person being the owner of any room building, arbor, booth, shed or tenement, of any description, shall rent the same to be used or occupied for gambling, the person so offending shall, on conviction thereof, be fined in any sum not less than thirty dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than ten days nor more than thirty days, or both at the discretion of the court. If the owner of any room, building, arbor, booth, shed or tenement of any description shall know that any gambling tables apparatus or establishment is kept or used in such room, building, arbor, booth, shed, or tenement for gambling and winning betting or gaining money or other property, and shall not forthwith cause complaint to be made against the person so keeping or using such room, building, arbor, booth, shed or tenement, he shall be taken, held and considered to have knowingly permitted the same to be used and occupied for gambling. Every day for which any person shall keep any house, room, building, tent or tenement of any description, to be used or occupied for gambling, and shall knowingly allow any such place to be used or occupied for gambling, shall be deemed and held to be a separate and distinct offense. (emphasis added.)

40-10-8. Keeping gaming table—gambling for livelihood—penalty. —If any person shall keep or exhibit any gaming table, establishment, device or apparatus to win or gain money or other property, or shall aid, assist or permit others to do the same, or *if any person shall engage in gambling for a livelihood*, or shall be without any fixed residence, and in the habit and practice of gambling, he shall be deemed and taken to be a common gambler, and upon conviction thereof shall be imprisoned in the county jail not less than three months nor more than one year, and be fined in any sum not less than two hundred dollars nor more than five hundred dollars. (emphasis added.)

(Continued on next page)

Title 1, U.S.C. § 109 is dispositive of this issue when it states:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

As 1 U.S.C. § 109 indicates, whether or not any liability incurred prior to repeal of a statute is to be abated depends upon the applicable repealing act. Colorado Revised Statute 40-1-103 (1972) requires all offenses committed prior to July 1, 1972, the effective date of the new Colorado Criminal Code, to be prosecuted under statutes in effect prior to July 1, 1972.[6] Because the Colorado statute does not obviate prosecutions for illegal activities occurring before July 1, 1972, 1 U.S.C. § 109 operates to nulify any abatement of the indictment and subsequent prosecution in this case. *See also* Pipefitters Local Union No. 562, et al. v. United States, 407 U.S. 385; United States v. Reisinger, 128 U.S. 398; Faubion v. United States, 10 Cir., 424 F_2 437.

Appellants also contend that Colorado Revised Statute 40-10-8

40-10-9. Wagering upon games—penalty.—*If any person shall play at any game whatsoever, for any sum of money or other property of value, or shall make any bet or wager for any sum of money or other property of value*, upon the result of such game, every such person, on conviction thereof, shall be fined in any sum not less than fifty dollars nor more than one hundred and fifty dollars. (emphasis added.)

The instructions to the jury by the district court included only those alternative means of violations which are underlined in the statutes above.

[6]Colorado Revised Statutes § 40-1-103(2) reads:

> The provisions of this code do not apply to or govern the construction of, prosecution for, and punishment for any offense committed prior to July 1, 1972, or the construction and application of any defense to a prosecution for such an offense. Such an offense shall be tried and disposed of according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted. All pending actions shall proceed to final disposition in the same manner as if this code had not been enacted.

(1963) is constitutionally infirm, and any assimilation of this statute by 18 U.S.C. § 1955 must be grounds for reversal. It is well settled in the law that Congress may adopt as federal laws the laws of a state, and such is not an unconstitutional delegation of congressional authority. United States v. Sharpnack, 355 U.S. 286. In this particular instance Congress has assimilated by reference Colorado's gambling statutes (now repealed), only one of which is challenged for vagueness although conviction rested upon all three statutes. We need not deal with this issue on its merits. Conviction in this case stands upon more than one statute, abrogating any necessity of addressing the constitutional challenge. In United States v. Levine, 10 Cir., 457 F_2 1186, this court refused to explore a constitutional challenge to one statute because the appellants had been convicted under two statutes, one of which was not being questioned. The court in *Levine* stated that it "should not decide abstract, hypothetical or contingent questions or any constitutional question in advance of the necessity of its decision." Levine, *supra* at 1189. Such necessity does not exist in this case. *See Dickenson v. Davis,* 10 Cir., 245 F_2 317.

C. The Denial of Severance and a Change of Venue.

Appellants Checkers, Young Gene, McNulty, Hanners, Lane, Dennis Valley, Erner and Garceo all petitioned the district court to be severed or granted a separate trial which was denied. They now complain that failure to sever prejudiced the trial result because the jury was unable to afford each appellant an independent determination of his guilt or innocence. We do not agree. It has been affirmed by this court many times that Fed. R. Crim. P. rule 14 leaves the question of severance to the sound discretion of the trial judge. United States v. Cooper, 10 Cir., 464 F_2 648; United States v. Jorgenson, 10 Cir., 451 F_2 516, *cert. den.*, 405 U.S. 922; United States v. Fairchild, 10 Cir., 435 F_2 972. Furthermore, a severance may be granted only where a defendant has shown that he would be clearly prejudiced by a joint trial. Lowther v. United States, 10 Cir., 455 F_2 657. The record on appeal shows that the

district court would consistently caution the jury when proffered evidence was admissible only against certain defendants. Also, during the course of the trial the court strictly limited the admissibility of evidence to specific defendants against whom the evidence was tendered. The record further shows an absence of inconsistent defenses which mitigates against the need for severance. United States v. Mallory, 10 Cir., 460 F_2 243; United States v. Troutman, 10 Cir., 458 F_2 217. Accordingly we find no abuse of discretion by the trial court in its denial of the motions to sever.

Appellants also assert that trial error was committed when the district court refused to grant a change of venue. Checkers and Young Gene claim that the name Smaldone is so closely associated with crime and violence in the Colorado area that any possibility of a fair trial was nonexistent. The other appellants allege that a change of venue was necessary in order that they might escape the phenomenon of guilt by association. As with the question of severance, we are bound to give great deference to the discretion of the trial court, absent clear abuse, when reviewing motions for a change in venue. Fed. R. Crim. P. rule 21; Dennis v. United States, 10 Cir., 302 F_2 5; Wheeler v. United States, 10 Cir., 382 F_2 998. The record reveals an exhaustive *voir dire* examination by the court of prospective jurors concerning possible prejudice. And there was nothing which occurred during actual selection of the jurors to indicate that they would render anything other than a fair and impartial verdict. Therefore, the totality of facts contained in this record does not warrant reversal.

D. The Selection of a Jury.

Ninety-seven prospective jurors were summoned by the trial court, twenty-two of whom were immediately dismissed upon indicating that they had read or heard of some of the defendants. The jury panel was then drawn from a venire of individuals who manifested no prior knowledge of the defendants or their activities. Appellants now assert, in direct contradiction to their jury prejudice claim, that a full and fair hearing was unavailable from

the jury because the empaneling process eliminated a class of people—" those with the intellectual capability and curiosity to read the newspapers." This assertion is spurious. The trial court was consistent in its attempts to protect the appellants from reaping the consequences of possible prejudice. To that end the court conducted a searching and thorough *voir dire* examination, excluding any prospective jurors whose knowledge or circumstances might possibly bias their deliberations. But to say that an identifiiable class, i.e., the "intellectually capable," was systematically excluded from jury duty requires substantiation which is not reflected in the record, nor does logic dictate its conceivability.

Appellant Dennis Valley asserts further trial error by claiming that he was denied an opportunity to inspect the master and qualified jury wheels, and to have certain *voir dire* questions asked of potential jurors. The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* is intended to insure that a fair cross section of the community is represented on federal juries. Among other procedures, it provides a method for challenging the selection of a grand or petit jury. Section 1867(d) states in pertinent part:

> Upon motion filed . . . containing a sworn statement of facts, which if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commission or clerk, and any other relevant evidence. . . . If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

Appellant Valley in accordance with the Act filed a motion to quash the array and dismiss the petit jury panel. Appellant alleged that certain identifiable groups of citizens were excluded from the jury pool in violation of constitutional requirements but offered nothing more than conjecture to substantiate this claim. Notwith-

standing, appellant urges that section 1867(d) requires that he be allowed to inspect all records including the master and qualified jury wheels in order to prove selection infirmities. Contrary to appellant's position, we believe the trial court fully complied with the letter and spirit of the Jury Selection Act in protecting appellant's right to a fair and impartial trial by his peers.

The record shows that, upon appellant's motion, the court carefully explained to counsel the jury selection procedure used by the United States District Court for Colorado, which was adopted to comply with the 1968 Act. Counsel had also previously been provided a copy of the jury selection plan. The court permitted examination of all pertinent records and documents although there is no evidence in the record to indicate that counsel availed himself of the opportunity to examine such documents. Additionally, the acting jury commissioner of the city and county of Denver was present in court during argument of the motion but appellant elected not to call the commissioner as a witness. Thus, the record indicates a failure by appellant to meet even the initial burden of establishing a prima facie showing that the jury selection plan used in this case is constitutionally invalid or that it is not in compliance with the provisions of the Jury Selection and Service Act of 1968. *See* United States v. Tijerina, 10 Cir., 446 F_2 675; United States v. James, 9 Cir., 453 F_2 27.

Appellant Dennis Valley prior to trial also submitted a list of proposed *voir dire* questions to be asked of prospective jurors. The thrust of these questions was to ascertain whether any jurors had placed bets upon sporting events or bingo games, and whether they understood the actual charges in the case.[7] Again, we are

[7]The counsel for appellant Dennis Valley submitted thirty-eight proposed questions to the court but only objects to the court's refusal to ask the following three questions:

15. Have you ever heard of people placing bets on baseball, football, or basketball games? If so do you think this is an immoral activity? Have you yourself ever made a bet on the outcome of a game? Have you ever participated in organized Bingo games for money stakes?

(Continued on next page)

asked to review a matter which rests within the discretion of the trial court, especially if the *voir dire* examination is conducted by the court itself pursuant to Fed. R. Crim. P. rule 24(a). Of course, counsel was free to submit proposed *voir dire* questions, but the court was at liberty to pursue its examination in any manner subject to the essential demands of fairness. Lowther v. United States, 10 Cir., 455 F_2 657; United States v. Brewer, 10 Cir., 427 F_2 409; United States v. Williams, 10 Cir., 417 F_2 630. A review of the record convinces us that there was no abuse of discretion by the trial court in not asking the proffered *voir dire* questions.

E. The Jury Instructions.

Appellants press upon this court the contention that several of the instructions to the jury were so misleading that they constitute plain error. Each instruction will be separately discussed, though upon careful review of the instructions, taken as a whole, we find no basis for reversal.

1. *The Reasonable Doubt Instruction.*

The trial court gave the following reasonable doubt instruction:

> A reasonable doubt is a doubt based upon reason and common sense. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such that you would be willing to rely and act upon it in the more important of your own personal affairs. . . .
>
> A reasonable doubt exists, ladies and gentlemen, when after a careful and impartial consideration of all of the evidence in the case the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

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17. What do you think of people who gamble?
38. Do you under that merely being in the business of gambling also is not the charge against the defendants? The charge is conducting, financing, managing, supervising, directing or owning a gambling business which was illegal under the law of the State of Colorado and was in operation for thirty or more days or had a gross revenue of $2,000 on any given day, and involved five or more persons in a supervisory capacity.

Appellants take exception to the "more important of your personal affairs' 'standard enunciated by the court, claiming that such is no more than a preponderance test.

It must be noted that courts have been engaged in a continual struggle to develop formulations which adequately convey to the jury the meaning of "reasonable doubt." The Supreme Court, for example, when faced with a challenge to an instruction similar to that in the instant case stated that the better charge would have been in terms of "the kind of doubt that would make a person hesitate to act." Holland v. United States, 348 U.S. 121, 140. Yet, that Court found no reversible error because "the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." *Id.* We conclude that the same rationale applies to this case, especially in light of the additional "moral certainty" instruction enunciated by the trial court and the applicable review standard which allows us to view any single instruction as part of a totality. United States v. Fletcher, 10 Cir., 444 F_2 619; Devine v. United States, 10 Cir., 403 F_2 93; Adams v. United States, 10 Cir., 375 F_2 635; Lewis v. United States, 10 Cir., 365 F_2 672.

2. *The "Risk" Instruction.*

Appellants contend that the government must prove that each conductor possessed specific intent to violate § 1955. They therefore object to a "running the risk" instruction claiming that, at best, it was confusing to the jury while in all likelihood the consequence of the instruction in the jurors' minds became no more than the declaration of a conspiracy charge.[8]

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[8]The court gave the following instruction:

Each defendant is to be considered separately, but the essence of the law is that the United States must prove beyond a reasonable doubt that the individual defendant that you are considering was involved in the illegal business with four or more other persons, some of whom may or may not have been named as defendants.

If you find that any person named as a defendant in these counts was engaged in the conduct of an illegal gambling business at least

(Continued on next page)

After careful consideration of the statute and its history we conclude that § 1955 is not a specific intent statute, thus relegating any possible prejudicial effect on appellants' case from the "risk" instruction to the arena of harmless error.[9] The gambling activities for which appellants were convicted find their origin in Colorado law. The additional elements necessary for conviction under § 1955 are standards essential to warrant federal intervention. United States v. Ceraso, 3 Cir., 467 F_2 653. As such, it was not necessary for appellants to be aware of all of the federal ingredients enunciated in § 1955 before a conviction could be obtained.[10] *See generally* United States v. Gardner, 9 Cir., 454 F_2 534. Therefore, appellants in a very real sense took a risk when violating

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in part, it does not matter under the law that he may not have known all the participants in the particular gambling business or known that it was a business which was being conducted by five or more persons. If that person named as a defendant conducted a part of the gambling business, he ran the risk that it may involve five or more persons and the further risk that the business had been or remained in continuous operation for a period in excess of 30 days or that it might have a gross revenue in excess of $2,000 in any single day.

Appellants also strenuously argue that the "risk" instruction was, in fact, a conspiracy charge and that conspiracy cannot be charged under § 1955. Although we make no determination as to whether § 1955 can be the basis of a conspiracy charge it should be noted that three circuit court have sustained conspiracy convictions under § 1955: United States v. Iannelli, 3 Cir., 477 F_2 999; United States v. Thaggard, 5 Cir., 477 F_2 626; United States v. Fiorella 2 Cir., 468 F_2 688. Only one circuit thus far has reversed a conviction on a conspiracy count under § 1955: United States v. Hunter, 7 Cir., 478 F_2 1019.

[9]At trial the court also gave the standard "specific intent" and "knowingly" instructions. Given our present holding the appellants received, if anything, more favorable jury instructions than those to which they were entitled.

[10]Our conclusion is further bolstered by reference to 18 U.S.C. § 1952 where substantive elements of the offense, e.g. "racketeering" ar defined by state law, but a nexus to interstate commerce must also be established before a federal crime is committed. Four circuits have held that for a conviction under 18 U.S.C. § 1952 a defendant need not be aware of the federal jurisdictional elements. United States v. Roselli, 9 Cir., 432 F_2 879; United States v. Hanon, et al., 8 Cir. 428 F_2 101; United States v. McMenama 6 Cir., 403 F_2 996; United States v. Miller, et al., 7 Cir., 379 F_2 483 *cert. den.*, 389 U.S. 930.

state gambling enactments that they might also come within full reach of federal criminal sanctions.

3. *The Aiding and Abetting Instruction.*

Appellants next assign as error the trial court's aiding and abetting instruction claiming that it only further confused the jury into including those accused of aiding and abetting as part of the five conductors necessary for a conviction under § 1955.[11] Again, appellants can find little comfort in this contention. Under count I four admitted conductors took the stand while under count II six conductors testified evidencing that little, if any, confusion by the jury could have occurred. Furthermore, the trial court was most circumspect in formulating its instructions and explaining them to the jury, which likewise attenuated any possible prejudice. Moreover, appellate courts should be slow to impute to juries the inability to correctly understand the totality of jury instructions, even in a case as complicated as the present. *Cf.* Fairmont Glass Works v. Cub Fork Coal Co. et al., 287 U.S. 474; Roth v. United States, 10 Cir., 339 F$_2$ 863.

Other assignments of error in the trial court's instructions to the jury are without merit.

F. The Dennis Valley Contentions.

Appellant Dennis Valley puts forth additional contentions of

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[11]Pursuant to 18 U.S.C. § 2 the district court gave the following instruction:

Each Count of the Indictment also charges a violation of Title 18, United States Code, Section 2.

In a case where two or more persons are charged with the commission of a crime, the guilt of an accused may be established without proof that all the defendants did every act constituting the offense.

This statute which I have alluded to, Section 2 of Title 18, provides in substantial part as follows:

"Whoever commits an offense against the United States or wilfully aids, abets, counsels, commands, induces or procures its commission is punishable as a principal and whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

trial error not asserted by other appellants: (1) that the trial court erred in allowing testimony as to events after the close of the indictment period, and (2) that a mistrial should have been declared when it was discovered that an outline of each witness' testimony was left in the witness room.

As to the first assignment of error, appellant argues that his case was prejudiced when three witnesses were allowed to testify to gambling contacts with Valley after the end of the indictment period charged in the second count. The record reveals limited references to certain events, but the specifics of these encounters were not allowed into evidence. The record also discloses that this testimony was introduced to show that the gambling operation was part of a continuous enterprise. Accordingly, the evidence was properly admitted for the limited purpose of establishing a course of conduct and a common gambling scheme. United States v. Pauldino, 10 Cir., 443 F_2 1108; Collins v. United States, 10 Cir., 383 F_2 296.

Appellant Valley also claims that a mistrial should have been declared when on the fifth day of trial a government attorney inadvertently left a "trial manual" in the witness room. The trial manual contained the names of government witnesses and a brief summary of the possible testimonies of certain of these witnesses. One of the nitnesses testified to having seen the manual. The trial court thoroughly examined this witness, after which a determination was made that the presence of the manual was not prejudicial. This question was properly addressed to the second discretion of the trial court and upon review we find no abuse of that discretion or manifest injustice. *See generally* United States v. Stidham, 10 Cir., 459 F_2 297; Jornston v. United States, 10 Cir., 260 F_2 345; Mitchell v. United States, 10 Cir., 126 F_2 550.

G. The Garceo Arrest.

The district court denied pretrial motions to suppress the arrest and subsequent incriminating statements of appellant Frank Joseph Garceo based upon the following evidence: Early in

October 1971 a warrant had been obtained by members of the Organized Crime Unit of the Denver Police Department to search a residence located at 3556 Tejon in Denver. The warrant was executed by four investigators including Officer Donald Mulnix, who was the only government witness to testify as to these occurrences at the pretrial hearing and at trial. After knocking on the door and announcing themselves as police officers, they broke a window and gained entry into the duplex. The search disclosed one Neil Sutton who was placed under arrest after he was discovered hiding in the kitchen. The officers also found near the telephone a number of sheets of paper upon which gambling wagers were apparently recorded as well as a weekly sports journal with betting information written in the margins.

Approximately five minutes after the police entered the residence, appellant Garceo came to the door and inquired as to what was transpiring. He was brought into the residence and immediately placed under arrest. After being made aware of his rights, the appellant signed an advisement of rights form and a short time later dictated an incriminating statement concerning illegal gambling activities undertaken at the Tejon street residence. It is this arrest and subsequent statement that appellant now chal lenges.

We believe that the search warrant in this case met the standards prescribed in Aguilar v. Texas, 378 U.S. 108, and Spinelli v. United States, 393 U.S. 410. The warrant was issued upon information received from a reliable informant and an independent investigation undertaken by the affiant. But, even given the legality of the search in this case, the fourth amendment still commands that probable cause must have existed at the moment of appellant's arrest. Beck v. Ohio, 379 U.S. 89. To establish probable cause for arrest it was necessary for the government to demonstrate that the arresting police officer had facts and other reasonably trustyworthy information within his knowledge which would be such as to warrant a prudent man into believing that the appel-

lant had committed, or was committing, an offense, United States v. Richerson, 10 Cir., 461 F_2 935; Holbrook v. United States, 10 Cir., 406 F_2 44. Appellant Garceo's arrest failed to meet that standard.

Garceo was arrested after appearing at the door of a residence, whcih was not his own, and inquiring "what the hell is going on." The only other factual predicates surrounding the arrest were the gambling paraphernalia found in the residence and the statement by Officer Mulnix that Garceo was a known gambler who was often seen in the area. Certainly the totality of these facts falls short of that necessary level of probable cause required for an arrest, especially when the allegation that Garceo was a known gambler "is but a bald and unilluminating assertion of suspicion that is entitled to no weight. . . ." Spinelli, *supra* at 414.

The record does support the trial court's finding that the *Miranda* warnings were properly given after appellant's arrest and that his subsequent inculpatory statement was voluntarily and knowingly made. Furthermore there does not appear in this case to be any exploitation of an illegal arrest or detention. Accordingly the statement in question was admissible even though the appellant was illegall yin police custody. United States v. Lepinski, 10 Cir., 460 F_2 234; United States v. Davis, 10 Cir., 456 F_2 1192; Mapys v. United States, 10 Cir., 409 F_2 964.

H. The Sufficiency of the Evidence.

The final issue to which we address ourselves is the sufficiency of the evidence upon which the appellants were convicted. The standard of evidentiary review is well settled in this circuit: "The evidence — both direct and circumstancial, together with reasonable inferences to be drawn therefrom — is sufficient if, when taken in the light most favorable to the government, the fact finder may find the defendant guilty beyond a reasonable doubt." United States v. Ortiz, 10 Cir., 445 F_2 1100, 1103. Furthermore, evaluating the credibility of witnesses when there is a conflict in testimony, as in this case, is for the jury and not an appellate

court. United States v. Cierra, 10 Cir., 452 F$_2$ 291; United States v. Weiss, 10 Cir., 431 F$_2$ 1402. Our review of the record on both counts of the indictment as it applies to each appellant convinces us that ample evidence existed from which a jury could render guilty verdicts.

In order for the government to prove that 18 U.S.C. § 1955 was violated, it was not only necessary to show that there was a gambling operation in violation of state law, but that it was conducted, financed, managed, supervised, directed, or owned by at least five people and that it operated substantially continuously for at least thirty days or had more than $2000 gross revenue in any single day. It was not essential, contrary to appellants' assertions, to establish that each conductor was involved in the gambling business for more than thirty days or generated at least $2000 gross revenue in a single day. These requirements refer to the gambling operation and not to individuals. United States v. Dimario, 6 Cir., 473 F$_2$ 1046; United States v. Ceraso, 3 Cir., 467 F$_2$ 653. And the five individual participants necessary to sustain a federal conviction need not carry on or cause the entire gambling operation to function. Congress' intent was to incorporate within the statute's prohibition all participants, except those who actually wagered, no matter their roles including "high level bosses and street level employees." 2 U.S. Code Cong. and Admin. News. 1970, pp. 4029-4030; United States v. Becker, 2 Cir., 461 F$_2$ 230; United States v. Riehl, 3 Cir., 460 F$_2$ 454. It is against these criteria that the sufficiency of the evidence in this case must be weighed.

The factual predicates upon which the convictions were based have been extensively discussed throughout the opinion rendering a comprehensive recitation of the evidence unnecessary. Suffice it to note that the record is replete with evidence showing that a well-organized and widespread gambling operation was being conducted for several years in the Denver area. The direct and circumstantial evidence is sufficient to confirm a link between

each appellant and at least four other conductors involved in the gambling business. And, all other elements necessary for a conviction under Colorado law and 18 U.S.C. § 1955 are confirmed on the record.

Each and every other contention of trial error has been considered and found without merit.

The convictions of Eugene Louis Smaldone, Guy McNulty and Melvin Daniel Hanners on count I are affirmed.

The conxvictions of Eugene Louis Smaldone, Eugene Smaldone, Leo Edward Lane, Dennis Michael Valley, Michael J. Valley, Josef Richard Erner, and Harry Anthony Villano on count II are affirmed.

The October 2, 1971 arrest of Frank Josef Garceo, as already discussed, was illegal. But, the circumstances leading to a subsequent inculpatory statement indicate that it was voluntarily made and therefore admissible despite its suspect nature. This statement considered with other proffered testimony as to Garceo's activities leads us to conclude that sufficient evidence existed to sustain the jury's verdict. The conviction of Garceo is affirmed.

APPENDIX C

SEPTEMBER TERM — NOVEMBER 7, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Don N. Laramore, Judge, Court of Claims, and Honorable Robert H. McWilliams, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DENNIS MICHAEL VALLEY, Defendant-Appellant.	No. 72-1859

This matter comes on for consideration of the petition for rehearing filed by appellant in the above case.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS,
Clerk

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-909

EUGENE SMALDONE, aka CHECKERS, aka MOSES; EUGENE LOUIS SMALDONE, aka YOUNG GENE, aka HUGH; LEO EDWARD LANE; JOSEF RICHARD ERNER, aka JOSEPH, aka RICK; and HARRY ANTHONY VILLANO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on April 15, 1974, and (2) granting the petition. As grounds for this petition, petitioners state the following:

I. *THE TRIAL COURT SHOULD HAVE GRANTED DEFENSE MOTIONS TO SEVER DEFENDANTS BECAUSE DEFENDANTS' ACTS DID NOT REFLECT A UNITARY CONSPIRACY.*

It is the position of petitioners that the trial court improperly denied the defendants' Smaldone motions to sever the trial of each of the defendants brought pursuant to Rules 8(b) and 14 of the Federal Rules of Criminal Procedure. Reliance is placed upon the decision in *United States v. De Cesaro*, 54 F.R.D. 596 (E.D. Wisc. 1972), a 18 U.S.C. § 1955 prosecution involving eleven co-defendants. It is submitted that the same considerations and factors which led the *De Cesaro* Court to conclude that severance was proper are present in the instant case.

II. *THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE ISSUE OF REASONABLE DOUBT.*

It is submitted that the trial court improperly instructed the jury on the burden of proof required to be sustained in a criminal case by charging as follows:

> "A reasonable doubt is a doubt based upon reason and common sense. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such that you would be willing to rely and act upon in the more important of your own personal affairs." (T. 1315-1316)

The above-quoted instruction is improper. In *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), the Supreme Court specifically renounced a similar instruction that reasonable doubt was "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." (348 U.S. at 140). In reaching this conclusion, the Supreme Court held that the charge should have been in terms of "the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act."

A similar instruction was rejected by the United States Court of Appeals for the District of Columbia in *Scurry v. United States,* 347 F.2d 468 (C.A.D.C. 1965). In both the *Scurry* and *Holland* decisions, the Court looked to the entirety of the trial judge's instructions in determining that the erroneous reasonable doubt instruction did not constitute reversible error. In *Scurry,* the Court held that such an instruction did not constitute reversible error in view of the trial judge's additional charge that reasonable doubt is "such a doubt as in the graver, more important transactions of life would cause an ordinary and prudent person to hesitate and pause." In the instant case, however, at no time did the trial judge correct the improper instruction in accordance with the Supreme Court's mandate in *Holland.* Consequently, the Court's reasonable doubt instruction constituted reversible error.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioners pray that the Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF COUNSEL

CLARK L. DERRICK, Counsel for the petitioners, certifies to this Court that this Petition for Rehearing is presented in good faith, and not for delay.

Counsel further certifies that this Petition is restricted to a substantial ground which was available to the petitioners, but which was not previously presented to this Court.

Clark L. Derrick
Counsel for Petitioners